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1708

No. 10849

2400

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

AMELIA E. COLLINS,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

AUG 14 1945

PAUL P. O'BRIEN,
CLERK

No. 10849

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Board of Tax Appeals

Docket No. 109843

AMELIA E. COLLINS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency * * *, dated December 19, 1941, * * *, and as a basis of her proceeding says:

* * * * *

2. The notice of deficiency (a copy of which, with accompanying statement, is attached hereto and marked Exhibit "A" and by reference incorporated herein in full) was mailed to petitioner on or after December 19, 1941. [1*]

* * * * *

5. The facts upon which petitioner relies as the basis of this proceeding (in addition to those set forth above) are as follows:

* * * * *

(f) On February 28, 1938, the Superior Court of the State of California in and for the County of Los Angeles, in which court was pending the administration of the decedent's estate, entered an

*Page numbering appearing at top of page of original certified Transcript of Record.

order for ratable distribution to petitioner herein of certain property therein described, which property had previously been listed in the inventory and appraisement, of the appraised value of \$902,068.69. Said distribution was thereupon made to petitioner in her individual capacity.

(g) On April 14, 1938, the aforementioned court entered an order for another ratable distribution to petitioner of certain property therein described, which property had previously been listed in the inventory and appraisement, of the appraised value of \$374,949.33. Said distribution was thereupon made to petitioner in her individual capacity.

(h) On July 20, 1938, the court approved the first and final account, report and petition for distribution filed by the executrix, petitioner herein, in which account petitioner was charged with certain receipts and given credit for certain disbursements, including the distributions hereinabove [2] mentioned, leaving for distribution a balance of \$140,772.82. On July 20, 1938, the court ordered distribution to petitioner of said \$140,772.82. Said distribution was thereupon made to petitioner in her individual capacity, and thereafter petitioner held no assets in her fiduciary capacity.

(i) The federal estate tax return of the estate of said decedent was filed by petitioner, as executrix, subsequent to August 1, 1938, but within the time required by law, with the Collector of Internal Revenue at Los Angeles, California. Said estate

tax return disclosed a tax liability of \$89,400.97, which was forthwith paid by petitioner.

(j) After the filing of said return and the payment of the estate tax there shown to be due, and prior to October 20, 1939, a revenue agent in the office of the Internal Revenue Agent in Charge at Los Angeles, California, examined said estate tax return and proposed a deficiency in estate tax of \$130,116.66.

* * * * *

Wherefore, the petitioner prays that the Board will hear this proceeding, decide that there is no deficiency and that, on the contrary, there is an overpayment of \$143.27; and that the Board will determine as part of its decision that the entire [3] amount of such or any overpayment was paid within three years before the filing of the petition herein.

JOSEPH D. BRADY

CHARLES M. WALKER

Attorneys for Petitioner.

(Duly Verified.)

EXHIBIT "A"

Form 1230

Treasury Department
Internal Revenue Department
12th Floor

U. S. Post Office and Court House,
Los Angeles, California
Dec. 19, 1941.

Office of
Internal Revenue Agent
in Charge
Los Angeles Division
LA:IT:90D:PB

Mrs. Amelia E. Collins,
Route 2, Box 394,
Phoenix, Arizona.

Madam:

You are advised that the determination of your income tax liability for the taxable year (x) ended December 31, 1939 discloses a deficiency of \$881.42 as shown in the statement attached. [4]

* * * * *

Respectfully,

GUY T. HELVERING
Commissioner.

By GEORGE D. MARTIN
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver.

STATEMENT

LA:IT:90D:PB

Mrs. Amelia E. Collins

Route 2, Box 394

Phoenix, Arizona.

Tax Liability for the Taxable Year Ended
December 31, 1939.

	Liability	Assessed	Deficiency
Income tax	\$1,690.59	\$809.17	\$881.42
* * *	* *	* *	* *

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$ 6,633.64
Additional income and unallowance deductions:	
(a) Dividends received	\$3,750.00
(b) Interest received	818.75
(c) Long-term capital gain omitted.....	66.67
(d) Interest paid disallowed	8,779.39
(e) Fee paid for management of securities disallowed	2,000.00
	<hr/>
Total	\$22,048.45
Additional deductions:	
(f) Contributions	2,237.22
	<hr/>
Net income adjusted	\$19,811.23

EXPLANATION OF ADJUSTMENTS

* * * * * * *
(d) The deductions of \$8,779.39 claimed for interest paid is disallowed because the amount does not represent interest on indebtedness within the meaning of section 23 (b) of the Internal Revenue Code.
* * * * * * *

COMPUTATION OF TAX

Net income adjusted		\$19,811.23
Less: Personal exemption		1,000.00
		<hr/>
Balance (surtax net income).....		\$18,811.23
Less: Interest on Government obligations..	\$2,676.66	
Earned income credit	300.00	2,976.66
		<hr/>
Net income subject to normal tax.....		15,834.57
Normal tax at 4% on \$15,834.57.....	633.38	
Surtax on 18,811.23.....	1,105.46	
		<hr/>
Total tax		1,738.84
Less: Income tax paid at the source.....	18.25	
Income tax paid to a foreign country	30.00	48.25
		<hr/>
Correct income tax liability.....		1,690.59
Income tax assessed:		
Original, account No. 840213.....	107.73	
Additional, Sept., 1941		
account No. 519008	528.31	
Additional, Dec., 1941		
account No. 519206	173.13	
		<hr/>
Total assessed		809.17
		<hr/>
Deficiency of income tax	\$	881.42

[End of statement]

[Endorsed]: Filed February 2, 1942. [6]

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the

petition of the above-named taxpayer, admits, denies and alleges as follows:

* * * * *

2. Admits the allegations contained in paragraph 2 of the petition.

* * * * *

5 (a) to (g), inclusive. Admits the allegations contained in subdivisions (a) to (g), inclusive, of paragraph 5 of the petition.

5 (h). Denies the allegations contained in subdivision (h) of paragraph 5 of the petition.

5 (i). Admits the allegations contained in subdivision (i) of paragraph 5 of the petition, except that the respondent denies that the tax was paid by the petitioner in her individual capacity.

5 (j). Admits the allegations contained in subdivision (j) of paragraph 5 of the petition.

* * * * *

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

[Duly Signed.]

[Endorsed]: Filed March 21, 1942. [7]

[Title of Tax Court and Cause.]

MEMORANDUM OPINION

[Entered March 13, 1944]

Turner, Judge: Respondent determined an income tax deficiency against petitioner for the year 1939 in the amount of \$881.42. The issues raised by the pleadings are (1) whether the petitioner is entitled to a deduction of \$8,779.39 paid by her as interest on a deficiency in estate tax assessed against the estate of her deceased husband, and (2) whether she is entitled to a deduction of \$2,000 paid by her to an investment counselor for services rendered by him during that year in the management of petitioner's securities.

All the facts have been stipulated and are found as stipulated. [8]

Petitioner, a resident of Los Angeles County, California, on March 15, 1940, filed her individual income tax return for the year 1939 with the Collector of Internal Revenue at Los Angeles, California.

Petitioner's husband, Thomas H. Collins, died a resident of Los Angeles County, California, on June 3, 1937, and his will was duly admitted to probate in the Superior Court of California in and for the County of Los Angeles. On July 20, 1937, petitioner was appointed, and qualified, as executrix of the estate. Petitioner has not been discharged as executrix of her husband's estate, and the probate files in the matter of the estate have not been closed.

The terms of the will directed the payment of

debts, expenses of last sickness and funeral expenses, and devised and bequeathed all the residue of the estate to petitioner, the surviving widow.

The appraised value of the assets of the estate was \$1,524,622.43. The amount of Federal estate tax liability was eventually and finally determined to be \$199,400.97, after credit for state estate, inheritance, legacy or succession taxes.

On February 28, 1938, the Superior Court, on petition of the executrix, ordered a distribution of certain property which previously had been appraised at \$902,068.69, and the distribution of that property was thereupon made to petitioner. On April 14, 1938, on order of the Superior Court, another distribution of property, appraised at \$374,949.33, was made to petitioner.

On July 20, 1938, the Superior Court approved the first and final account, report and petition for distribution filed by the executrix, [9] in which account she was charged with certain receipts and given credit for certain disbursements, including the above distributions, leaving for distribution a balance of \$140,772.82, which distribution was made by the said order.

The order settling the final account and report provides, among other things, "that said account be allowed and settled accordingly; and in pursuance of and according to the provisions of the last will of said deceased, and by operation of law; and ratable distribution having been heretofore made by order of this Court on April 14, 1938, the aforesaid cash, and the property hereinafter described,

and all other property belonging to said estate, whether described herein or not, be distribution as follows: The whole thereof to Amelia E. Collins, widow of the decedent."

On September 1, 1938, petitioner, as executrix, filed the Federal estate tax return of the Estate of Thomas H. Collins, Deceased, with the Collector of Internal Revenue at Los Angeles, California. The return disclosed a tax liability of \$89,400.97, which was promptly paid.

In due course, a revenue agent in the office of the Internal Revenue Agent in Charge, at Los Angeles, California, examined the return and proposed a deficiency in estate tax in the amount of \$130,116.66.

On October 20, 1939, petitioner paid to the Collector at Los Angeles, \$129,500 of the proposed deficiency, plus interest thereon in the amount of \$8,779.39, or a total of \$138,279.39, leaving unpaid \$616.66 of the proposed deficiency. This payment was made by a check drawn by petitioner against an account at the Santa Monica Branch of [10] Security-First National Bank of Los Angeles, carried under the name of Mrs. Amelia E. Collins, as an individual. The check was paid by the bank on October 25, 1939. On January 24, 1940, the Commissioner of Internal Revenue, by registered mail, sent to Amelia E. Collins, Executrix of the Estate of Thomas H. Collins, Deceased, notice of a deficiency in estate tax in the amount of \$616.66. A petition was duly filed with the United States Board of Tax Appeals wherein Amelia E. Collins, as executrix, alleged that the estate tax had been overpaid.

The petition was docketed by the Board at Docket No. 102218, and answer was duly made thereto by the Commissioner of Internal Revenue. On May 9, 1941, the Board entered its decision that there was an overpayment in estate tax in the amount of \$19,500.

Pursuant to the Board's decision there was issued to Amelia E. Collins, Executrix u/w of Thomas H. Collins, Deceased, under date of August 8, 1941, Certificate of Overassessment No. 9370-6th California, Schedule No. MTR-28863, in the principal amount of \$20,821.99 (\$19,500 plus \$1,321.99 interest). Under date of September 30, 1941, there was issued Treasury Check No. 1,215,346 in the amount of \$23,208.25, payable to Amelia E. Collins, Executrix u/w of Thomas H. Collins, Deceased, refunding \$19,500 of the estate tax previously paid and \$1,321.99 representing interest erroneously paid thereon, and making payment of \$2,386.26 representing interest due the estate on the amounts so refunded. This check was deposited by petitioner in her individual commercial account with the Security-First National Bank of Los Angeles on October 15, 1941. [11]

Petitioner's individual income tax return for the taxable year herein showed net income of \$6,633.64 which was arrived at by subtracting from a reported gross income of \$23,043.55, claimed deductions amounting to \$16,409.71. Of the claimed deductions, \$8,779.39 was deducted as interest paid to the Collector of Internal Revenue on October 20, 1939, on the estate tax deficiency. Petitioner now

concedes that the sum of \$8,779.39 has been reduced to \$7,457.47 by a refund of \$1,321.99 of the interest previously paid.

The aggregate fair market value of the assets of the Estate of Thomas H. Collins distributed to the petitioner was, at the respective times of distribution of the estate described above, substantially in excess of the amount of the total Federal estate tax liability of the decedent's estate. No portion of the estate tax was due or payable at or prior to the last of such distributions.

Ralph J. Green, 3 T. C. ——— (promulgated January 19, 1944), is directly in point and in keeping with the ruling in that case, it is held that petitioner is entitled to the interest deduction claimed, as adjusted by the amount thereof which was refunded under date of September 30, 1941.

* * * * *

Decision will be entered under Rule 50. [12]

[Title of Tax Court and Cause.]

DECISION

[Entered April 26, 1944]

Pursuant to the Memorandum Opinion of the Court entered March 13, 1944, the respondent herein having on April 19, 1944, filed a proposed recomputation of tax in accordance therewith, and the petitioner having on April 19, 1944, filed an acquiescence in such recomputation, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1939 in the amount of \$191.52, which amount was paid within three years before the filing of the petition herein (Section 322 (d), Internal Revenue Code).

[Seal of Tax Court.]

(Signed) BOLON B. TURNER

Judge. [13]

RESPONDENT'S EXHIBIT C

Joseph D. Brady
Attorney at Law
458 South Spring Street
Los Angeles
TRinity 4058

October 20, 1939.

Internal Revenue Agent in Charge,
Twelfth Floor, Federal Building,
Los Angeles, California.

Re: Estate of Thomas H. Collins,
Date of Death June 3, 1937,
District of 6th California.
Estate Tax.

Sir:

This will confirm the conversation of this afternoon with Mr. Joseph E. Mann of your office held in the presence of my client, Mrs. Amelia E. Collins, Executrix of the estate of her deceased husband, Thomas H. Collins.

Mr. Mann exhibited to Mrs. Collins and myself a computation showing a deficiency in estate tax of \$130,116.66. I advised Mr. Collins that, in my opinion, the principal adjustments made by Mr. Mann were correct. However, it appeared that in arriving at the gross and net estate as determined by Mr. Mann, he had included income received subsequent to the date of death, but prior to the optional date. This, I understand, is in accordance with the regulations, but I advised Mr. Mann that, in my opinion, such regulations were inconsistent with the statute and were invalid. Mrs. Collins was, however, anxious to stop the running of interest. On my advice, she executed and delivered to Mr. Mann Form 890, consenting to the assessment and collection of a deficiency of \$129,500. Also Mrs. Collins delivered to the Collector at Los Angeles this date a check for \$138,279.39, made up as follows:

(1) Deficiency in tax	\$129,500.00
(2) Interest thereon to 10/20/39	8,779.39

It was understood with Mr. Mann that you would probably issue a final notice of deficiency for \$616.66 from which the [14] estate could file a petition to the Board of Tax Appeals alleging not only that there was no deficiency, but that the tax had been overpaid.

It would be appreciated if you will kindly issue a 90-day notice at the earliest possible date to the end that the matter of correct tax liability may be determined as soon as possible.

An extra carbon copy of this letter is enclosed

herewith. Will you kindly place your office receipt stamp thereon and return the same to the undersigned as evidence on your receipt of the original hereof.

Respectfully,

(Signed) JOSEPH D. BRADY

Counsel for Amelia E. Collins,
Executrix.

cc: Mrs. Amelia E. Collins,
14954 Corona del Mar,
Pacific Palisades, California. [15]

RESPONDENT'S EXHIBIT D

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Office of Collector of Internal Revenue In re: Estate of Thomas H. Collins, Amelia E. Collins, Executrix, c/o A. G. Ritter, Attorney, 915 Black Building, District of Sixth California Los Angeles, California.
 To The Commissioner of Internal Revenue:
 Attention: Mr. Baird—Pacific Division, Technical Staff.

The following is a transcript of the records of this office covering the account of the taxpayer named above in respect to Federal estate tax.
 Date of death—June 3, 1937.

1. Taxable Period	2. List and Year	3. Acct. No. or Page and Line	Paid, Abated, or Credited		7. Paid Ab. Cr.	8. Adjustment of Overassessments
			5. Date or Schedule No.	6. Amount		
Returned Tax	Sept. 1938	103/6	9/ 1/38	89400.97	Pd.	
Deficiency Tax	Nov. 1939	194/1		129500.00		
		Int. 8779.39	10/20/39	138279.39	Pd.—Trf. from Acct. 9	
					Refunded \$20821.99	
					Sched. MTR-28863	
					dated 8/8/41	

I certify that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds relating thereto as disclosed by the records of this office, are shown therein.

Date of certificate: March 26, 1943.

R. A. RIDDELL,
 Deputy Collector in Charge of Internal Revenue

mo

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

(1) On July 20, 1938, the Superior Court of the State of California, in and for the County of Los Angeles, approved the first and final account, report and petition for distribution filed by the executrix, petitioner herein, in the Matter of the Estate of Thomas H. Collins, deceased, in which account petitioner was charged with certain receipts and given credit for certain disbursements, including the distributions mentioned in subparagraphs (f) and (g) of Paragraph 5 of the petition herein, leaving for distribution a balance of \$140,772.82. Attached hereto and made part of this stipulation as Exhibits 1 and 2, respectively, are (1) a copy of the first and final account, report and petition for distribution above referred to, and (Exhibits in custody of clerk) (2) a copy of the order of distribution of July 20, 1938. Distribution of the estate of Thomas H. Collins was made pursuant to the order of distribution above referred to on or shortly after July 20, 1938.

(2) The said Amelia E. Collins has not been discharged as Executrix of the said Estate of Thomas H. Collins, deceased, and the probate files in said matter have not been closed. [17]

(3) On October 20, 1939, petitioner paid to the Collector at Los Angeles \$129,500 of the deficiency of \$130,116.66 proposed by the revenue agent (as stated in paragraph 5 (j) of the petition herein), plus interest thereon in the amount of \$8,779.39, or a total of \$138,279.39, leaving a deficiency of \$616.66. This payment was made by a check drawn by petitioner against an account at the Santa Monica Branch of Security-First National Bank of Los Angeles carried under the name of Mrs. Amelia E. Collins, as an individual. This check was paid by the Bank on October 25, 1939. Attached hereto and made part of this stipulation as Exhibit 3 is a copy of the Bank's ledger sheet showing payment of this item. (Exhibit in custody of clerk)

(4) The total aggregate fair market value of the assets of the decedent's estate distributed to the petitioner was, at the respective times of the distributions of the Thomas H. Collins estate referred to in paragraph 5 of the petition, substantially in excess of the amount of the total federal estate tax liability of the decedent's estate. No portion of said estate tax liability had been paid at or prior to the last of such distributions.

(5) During the taxable year 1939 petitioner paid the sum of \$2,000.00 to A. M. Clifford as an investment counsellor for services rendered by him during said year in the management of petitioner's securities. Said sum is reasonable for the services rendered and was an ordinary and necessary expense paid during the taxable year for the management

and conservation of property, namely, securities, held for [18] the production of taxable income.

(6) At the time of and before the distribution of the Estate of Thomas H. Collins to petitioner, the petitioner had been advised by her attorney that the estate was subject to a liability for federal estate tax and that this liability, if the property of the decedent should be held taxable entirely to him, would be very substantially increased over the tax liability shown on the estate tax return filed by the executrix.

Dated March 27, 1943.

JOSEPH D. BRADY

W. S. NOSSAMAN

Counsel for Petitioner.

J. P. WENCHEL acb

Chief Counsel, Bureau of Internal Revenue,

Counsel for Respondent.

[Endorsed]: Filed March 29, 1943. [19]

In the United States Circuit Court of Appeals
for the Ninth Circuit

(BTA) Docket No. 109843

JOSEPH D. NUNAN, JR., Commissioner of
Internal Revenue,

Petitioner on Review,

v.

AMELIA E. COLLINS,

Respondent on Review.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Joseph D. Nunan, Jr., Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

* * * * *

IV.

ASSIGNMENTS OF ERROR

* * * * *

That the Tax Court of the United States erred:

1. In holding and deciding that the interest which accrued upon the estate tax deficiency after distribution of the assets of the estate accrued upon the indebtedness of taxpayer. [20]

2. In failing to hold and decide that the amount designated interest which accrued upon the estate tax deficiency after distribution of the assets of the estate did not accrue on a personal liability or obligation of taxpayer.

3. In holding and deciding that taxpayer is entitled, under the provision of Section 23(b) of the Internal Revenue Code, to deduct from her gross income the amount of interest paid by her on the estate tax deficiency which accrued thereon after distribution of the assets of the estate.

4. In failing to hold and decide that taxpayer is not entitled to deduct from her gross income the amount designated interest which accrued after the distribution of the assets of the estate and was paid in 1939 by her.

5. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

6. In ordering and deciding that there is an overpayment in income tax for the taxable year 1939 in the amount of \$191.52 due the taxpayer herein.

7. In failing to order and decide that there is a deficiency in income tax of \$806.43 for the taxable year 1939 due from the taxpayer herein.

[Here follows prayer for relief.]

SAMUEL O. CLARK, JR.

Assistant Attorney General.

.....

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Counsel
for Petitioner on Review.

Of Counsel:

CLAUDE R. MARSHALL,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: Filed July 12, 1944. [21]

[Title of This Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Joseph D. Brady, Esq.

Walter L. Nossaman, Esq.,

433 South Spring Street,

Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 12th day of July, 1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of The Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 12th day of July, 1944.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17th day of July, 1944.

WALTER L. NOSSAMAN

JOSEPH D. BRADY

Counsel for Respondent on
Review.

[Endorsed]: Filed July 21, 1944. [22]

[Title of This Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Amelia E. Collins,
Route 2, Box 394,
Phoenix, Arizona.

[Identical with foregoing notice of filing Petition for Review addressed to Joseph D. Brady, Esq.]

Dated this 12th day of July, 1944.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17th day of July, 1944.

JOSEPH D. BRADY

Counsel for Respondent on
Review.

STATEMENT OF POINTS AND PROOF OF SERVICE THEREOF

The Statement of Points is contained in the Petition for Review and is identical therewith, and the proof of service thereof is the proof of service of the Statement of Points.

[Endorsed]: Filed July 28, 1944. [23]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys of record for the respective parties to the above-entitled proceeding that only the foregoing portions of the typewritten transcript of record which was duly certified by the Clerk of the Tax Court of the United States and filed in the above-entitled Court on August 14, 1944, shall be printed as the record on review of the decision of the Tax Court entered therein on April 26, 1944, and that the portions so printed are sufficient in all respects properly to present to the Court all issues on review thereof.

Dated this 3rd day of May, 1945.

SAMUEL O. CLARK, JR.,

Assistant Attorney General

JOSEPH D. BRADY

W. L. NOSSAMAN

Attorneys for Respondent.

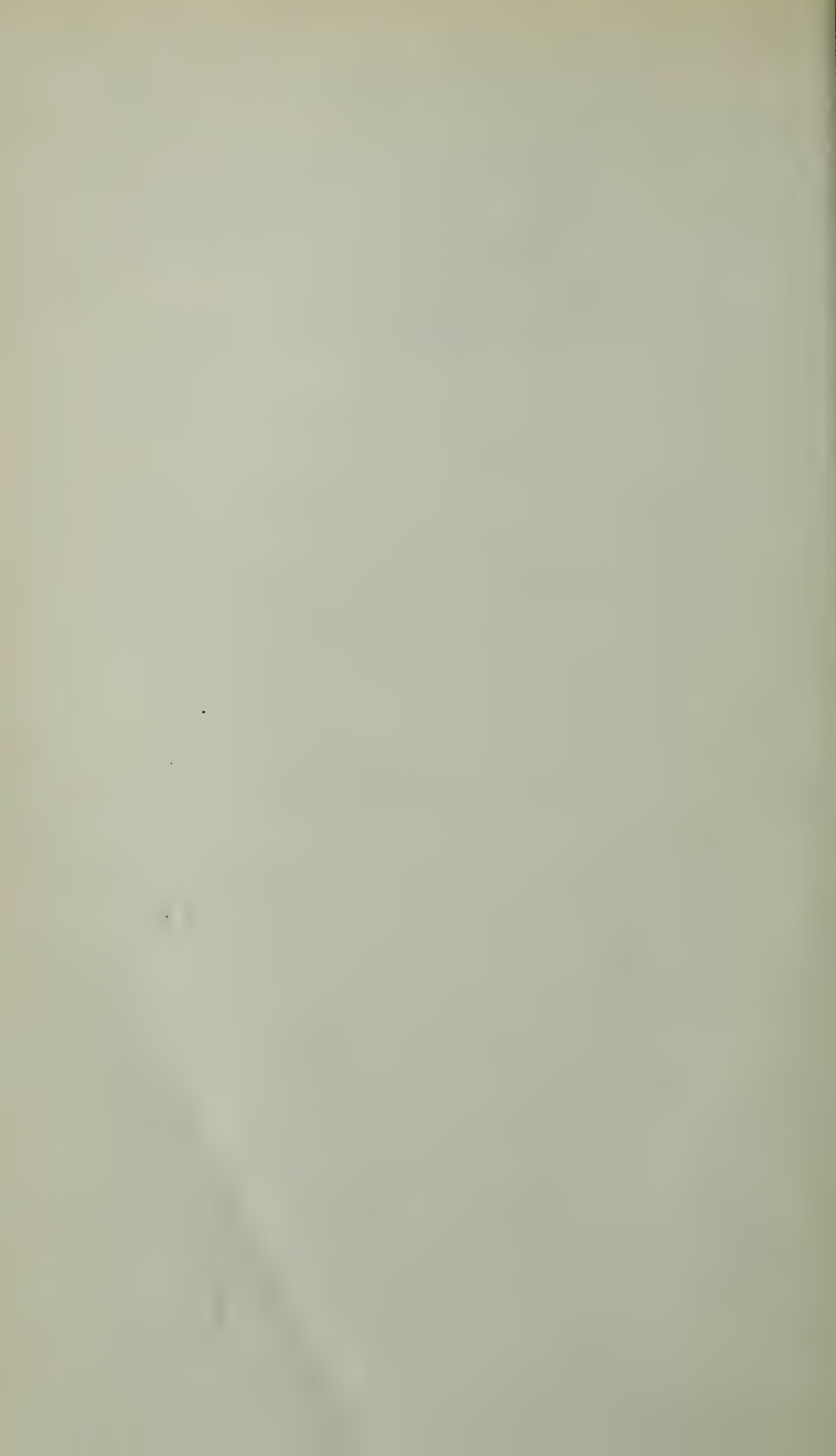
[24]

[Endorsed]: No. 10849. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Amelia E. Collins, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed August 14, 1944.

PAUL P. O'BRIEN

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.



No. 10849

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

U.

AMELIA E. COLLINS, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

HILBERT P. ZARBY,

Special Assistants to the Attorney General.

FILED

SEP 7 1945

PAUL P. O'BRIEN,
CLERK

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(I)

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10849

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

AMELIA E. COLLINS, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The memorandum opinion of the Tax Court is unreported. It is set forth in the record at pages 8-12.

JURISDICTION

This petition for review (R. 20-22) involves an asserted deficiency in income tax for the taxable year 1939. The notice of deficiency is dated December 19, 1941 (R. 4-6), and the taxpayer's petition for redetermination (R. 1-3) was filed with the Board of Tax Appeals (now the Tax Court of the United States) on February 2, 1942, under the provisions of Section 272 of the Internal Revenue Code. The decision of the Tax Court determining that there was an overpayment in income tax for the year 1939 in the amount of

\$191.52 was entered on April 26, 1944. (R. 12-13.) The case is brought to this Court by a petition for review filed by the Commissioner of Internal Revenue on July 12, 1944 (R. 20-22), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

The taxpayer was the executrix and sole distributee of the assets of her husband's estate. After distribution of all the assets, taxpayer paid a deficiency in estate tax plus interest thereon. Is the taxpayer, in computing her own income tax liability, entitled to a deduction under Section 23 (b) of the Internal Revenue Code for the interest so paid?

STATUTES INVOLVED

The relevant provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 10-11.

STATEMENT

The facts, as stipulated by the parties and found by the Tax Court, may be summarized as follows:

Taxpayer, a resident of Los Angeles County, California, on March 15, 1940, filed her individual income tax return for the year 1939 with the Collector of Internal Revenue at Los Angeles, California. (R. 8.)

Taxpayer's husband, Thomas H. Collins, died a resident of Los Angeles County, California, on June 3, 1937, and his will was duly admitted to probate. On July 20, 1937, taxpayer was appointed, and qualified, as executrix of the estate; she has not been discharged as executrix, and the probate files in the matter of the estate have not been closed. (R. 8.)

The terms of the will directed the payment of debts, expenses of last sickness and funeral expenses, and devised and bequeathed all the residue of the estate to taxpayer, the surviving widow. (R. 8-9.)

The appraised value of the assets of the estate was \$1,524,622.43. The amount of federal estate tax liability was eventually and finally determined to be \$199,400.97, after credit for state estate, inheritance, legacy or succession taxes. (R. 9.)

On February 28, 1938, the Superior Court, on petition of the executrix, ordered a distribution of certain property which previously had been appraised at \$902,068.69, and the distribution of that property was thereupon made to taxpayer. On April 14, 1938, on order of the Superior Court, another distribution of property, appraised at \$374,949.33, was made to taxpayer. (R. 9.)

On July 20, 1938, the Superior Court approved the first and final account, report and petition for distribution filed by the executrix, in which account she was charged with certain receipts and given credit for certain disbursements, including the above distributions, leaving for distribution a balance of \$140,772.82, which distribution was made to taxpayer by the order. (R. 9.)

On September 1, 1938, taxpayer, as executrix, filed the federal estate tax return of the estate of Thomas H. Collins, deceased, with the Collector of Internal Revenue at Los Angeles, California. The return disclosed a tax liability of \$89,400.97, which was promptly paid. (R. 10.)

In due course, a revenue agent in the office of the Internal Revenue Agent in Charge, at Los Angeles, California, examined the return and proposed a deficiency in estate tax in the amount of \$130,116.66. (R. 10.)

On October 20, 1939, taxpayer paid to the Collector at Los Angeles, \$129,500 of the proposed deficiency, plus interest thereon in the amount of \$8,779.39, or a total of \$138,279.39, leaving unpaid \$616.66 of the proposed deficiency. This payment was made by a check drawn by taxpayer against an account at the Santa Monica Branch of Security-First National Bank of Los Angeles, carried under the name of Mrs. Amelia E. Collins, as an individual. The check was paid by the bank on October 25, 1939. (R. 10.)

On January 24, 1940, the Commissioner of Internal Revenue, by registered mail, sent to Amelia E. Collins, executrix of the estate of Thomas H. Collins, deceased, notice of a deficiency in estate tax in the amount of \$616.66. A petition was duly filed with the United States Board of Tax Appeals wherein Amelia E. Collins, as executrix, alleged that the estate tax had been overpaid. On May 9, 1941, the Board entered its decision that there was an overpayment in estate tax in the amount of \$19,500. (R. 10-11.)

Pursuant to the Board's decision there was issued to Amelia E. Collins, executrix under the will of Thomas H. Collins, deceased, under date of August 8, 1941, a certificate of overassessment, in the principal amount of \$20,821.99 (\$19,500 plus \$1,321.99 interest). Under date of September 30, 1941, there was issued a

Treasury check in the amount of \$23,208.25, payable to Amelia E. Collins, executrix under the will of Thomas H. Collins, deceased, refunding \$19,500 of the estate tax previously paid and \$1,321.99 representing interest erroneously paid thereon, and making payment of \$2,386.26 representing interest due the estate on the amounts so refunded. This check was deposited by taxpayer in her individual commercial account with the Security-First National Bank of Los Angeles, on October 15, 1941. (R. 11.)

The taxpayer's individual income tax return for the taxable year 1939 showed net income of \$6,633.64, which was arrived at by subtracting from a reported gross income of \$23,043.55, claimed deductions amounting to \$16,409.71. Of the claimed deductions, \$8,779.39 was deducted as interest paid to the Collector of Internal Revenue on October 20, 1939, on the estate tax deficiency. The taxpayer conceded that the sum of \$8,779.39 was reduced to \$7,457.47 by a refund of \$1,321.99 of the interest previously paid. (R. 11-12.)

The aggregate fair market value of the assets of the estate of Thomas H. Collins distributed to the taxpayer was, at the respective times of distribution of the estate described above, substantially in excess of the amount of the total federal estate tax liability of the decedent's estate. No portion of the estate tax was due or payable at or prior to the last of such distributions. (R. 11.)

On the basis of its decision in *Green v. Commissioner*, 3 T. C. 74 (subsequently reversed in 148 F. 2d 157 (C. C. A. 9th), and 146 F. 2d 352 (C. C. A. 8th)),

the Tax Court determined that the taxpayer was entitled, under Section 23 (b) of the Internal Revenue Code, to deduct the amount of interest on the estate tax deficiency which was actually paid (\$7,457.47). (R. 12.)

STATEMENT OF POINTS TO BE URGED

The assignments of error which are relied on by the Commissioner as the basis for this proceeding are set forth on pages 20 and 21 of the record. They may be summarized by a statement that the Tax Court erred in holding that the taxpayer is entitled to the claimed deduction.

SUMMARY OF ARGUMENT

This case is indistinguishable from and is governed by the decision of this Court in *Commissioner v. Green*, 148 F. 2d 157. Accordingly, it is clear that in paying interest on the estate tax deficiency, taxpayer did not pay any interest on her own indebtedness and is not entitled to any deduction under Section 23 (b) of the Internal Revenue Code.

ARGUMENT

The taxpayer did not pay interest on her own indebtedness and is not entitled to the claimed deduction

We believe that the present case is governed in all respects by the decision of this Court in *Commissioner v. Green*, 148 F. 2d 157. Accordingly, no extended discussion of applicable principles is necessary to demonstrate that the decision of the Tax Court is erroneous and is required to be reversed.

Except in immaterial respects, the facts of this case are identical with those of *Commissioner v. Green, supra*. In each case a deficiency in estate tax was determined subsequent to the distribution of all the assets of the estate. In each case the taxpayer, who was a distributee of those assets¹ and who also served as executor, paid the estate tax deficiency together with interest thereon.² In each case the amount of the assets of the estate at the time of distribution exceeded the amount of the total estate tax and interest thereon. The ruling of the Tax Court in both cases was identical, namely, that Section 900 of the Internal Revenue Code (Appendix, *infra*) imposes a personal liability on a transferee to the extent that when he pays a tax asserted against his transferor he is paying his own tax and that the interest thereon is interest on his own indebtedness and deductible under Section 23 (b), of the Internal Revenue Code (Appendix, *infra*) in the computation of his own tax liability.³ The decision of this Court in *Commissioner v. Green, supra*, expressly repudiated this reasoning and, instead, held that Section 900 and similar provisions of prior Revenue Acts merely added to the

¹ In the present case the taxpayer received the entire residuary estate after payment of debts and expenses; in the *Green* case the taxpayer received one-half of the residuary estate.

² In the *Green* case, the taxpayer only paid one-half of the deficiency and interest, the other half being paid by the other residuary beneficiary of the estate.

³ The reasoning of the Tax Court is set forth in *Green v. Commissioner*, 3 T. C. 74; the Tax Court decided the present case by relying on its own decision in the *Green* case, *supra*.

Commissioner's means of collecting the tax by following the property, but did not create any new tax entities. Accordingly, the taxpayer here, as transferee of the assets of the decedent's estate, in paying the estate tax deficiency and interest thereon was merely disgorging property which she was not entitled to keep as against creditors of her husband's estate. She was in no manner paying any tax liability or indebtedness of her own and was not paying any interest on her own tax liability or indebtedness deductible under Section 23 (b).

The taxpayer argued, in the alternative, before the Tax Court, as did the taxpayer on appeal in the *Green* case, *supra*, that Section 3467 of the Revised Statutes (Appendix, *infra*), imposed a tax liability on her, as executrix, for having paid over the assets of the estate to herself before satisfying the estate tax in full. Accordingly, it was contended that the taxpayer, in paying interest on the deficiency, had paid interest on her own indebtedness which was deductible under Section 23 (b).

This argument, too, was rejected by this Court in *Commissioner v. Green, supra*. While, as set forth at length in our reply brief in the *Green* case, it is the Commissioner's contention that Sections 3466 and 3467 of the Revised Statutes (Appendix, *infra*) do not impose any tax liability on the executor, it is no more necessary to decide this question in its broadest aspects here than it was in the *Green* case, for here, as there, no proceedings were instituted against the taxpayer under Section 3467; the taxpayer did not

even purport to pay the deficiency in her capacity as executrix (R. 18); and there is nothing to show that the estate tax claims of the Government were prejudiced or jeopardized when the taxpayer, as executrix, transferred to herself, as residuary legatee, assets which greatly exceeded the Government's tax claim. In this respect, it may be noted that the view which this Court took with respect to Section 3467 was also adopted by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Henderson's Estate*, 147 F. 2d 619, 620.

The fact that the executors in the *Green* and *Henderson* cases, *supra*, had been discharged, while the taxpayer here had not been, is an immaterial variation in facts since the executor's liability under Section 3467 of the Revised Statutes is not affected by his discharge. *United States v. Weisburn*, 48 F. Supp. 393, 397 (E. D. Pa.); *Beasley v. Commissioner*, 42 B. T. A. 275; *Evans v. Commissioner*, 12 B. T. A. 334.

It follows that the taxpayer is not entitled to the deduction allowed by the Tax Court.

CONCLUSION

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted.

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AUGUST 1945.

APPENDIX

Internal Revenue Code:

SEC. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions:

* * * * *

(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 900. TRANSFERRED ASSETS.

(a) *METHOD OF COLLECTION.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *TRANSFEREES.*—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

(2) *FIDUCIARIES.*—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, Sec. 192) in respect of the payment of any such tax from the estate of the decedent.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(e) DEFINITION OF "TRANSFeree."—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. (26 U. S. C. 1940 ed., Sec. 900.)

Revised Statutes of the United States:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1940 ed., Sec. 191.)

SEC. 3467 [as amended by the Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 518 (a)]. Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C. 1940 ed., Sec. 192.)

No. 10849.

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Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Statement of the Case.

This case involves the deductibility of interest paid by respondent individually in the taxable year 1939 on a deficiency in estate tax determined against the estate of respondent's deceased husband. Respondent was executrix and sole legatee and the *entire* amount of interest involved accrued *after* the estate had been distributed to respondent. (Respondent will hereinafter be referred to as taxpayer.)

The Tax Court in a memorandum decision [R. 8-12] upheld the taxpayer's right to the deduction claimed.

The Commissioner's brief, pp. 2-6, correctly summarizes the principal facts.

Statutes Involved.

1. Section 23(b), Internal Revenue Code:

Sec. 23. *Deductions from Gross Income*—

In computing net income there shall be allowed as deductions:

* * * * *

(b) *Interest*.—All interest paid or accrued within the taxable year on indebtedness, * * *

2. Section 827(a), Internal Revenue Code (identical with corresponding Section 315(a), Revenue Act of 1926, as amended by Section 613(b), Revenue Act of 1928, and Section 809, Revenue Act of 1932):

Sec. 827. *Lien for Tax*.

(a) *Upon Gross Estate*.—Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed

3. Section 900(a), Internal Revenue Code:

Sec. 900. *Transferred Assets*.

(a) *Method of Collection*.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions

and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees*.—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

(2) *Fiduciaries*.—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, §192) in respect of the payment of any such tax from the estate of the decedent.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

4. Revised Statutes, Section 3467:

Sec. 3467. Revised Statutes (as amended by Section 518(a) of the Revenue Act of 1934 [U. S. C., 1934 edition, Title 31, Section 192]). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Summary of Argument.

A statement of four points on which taxpayer relies will indicate the direction her argument will take. The right to the deduction claimed is sustained by and flows from the following propositions:

I. Taxpayer alone had the benefit of the debt to the United States upon which the interest accrued.

II. The estate tax debt to the United States was taxpayer's personal obligation, because of her act in *distributing* the estate (R. S. 3467, 31 U. S. C. A., Section 192).

III. The estate tax debt to the United States, being paid to discharge the estate tax lien on property which taxpayer *received* from the estate, was taxpayer's debt within the meaning of the revenue laws.

IV. As a transferee, taxpayer stepped into the shoes of the estate, the transferor.

The Court has not previously passed upon the arguments herein advanced. The questions here presented were involved and could have been, but were not, presented (or at least were not effectively presented) in *Commissioner v. Green*, 148 F. (2d) 157. We shall contend that the *Green* case is not an authority because

(a) The taxpayer was not represented, except nominally, by counsel, the brief in that case having been prepared by the layman who represented the taxpayer (and the taxpayer's brother Ralph J. Green) in the Tax Court. [See Appendix.] There was no oral argument for the taxpayer.

(b) The *Lawrence Green* case was, in effect, decided upon the Government's *ex parte* presentation, the controlling authorities and even the controlling statutes not being brought effectively to the Court's attention. The same applies to the *Ralph J. Green* case in the Eighth Circuit, presented and decided under identical conditions.

(c) Irrespective of the foregoing, the *Lawrence Green* case can, we submit with deference, be shown with mathematical certainty to have been wrongly decided. The principle involved being one of great importance, we respectfully suggest that the questions presented should be examined *de novo*, in the light of the applicable statutes and authorities. A further, and we believe urgent reason for re-examination of the problem arises out of the fact that the decision by the Third Circuit on August 31, 1945 of the *Breyer and Koppers Co.* cases creates a conflict between that Circuit on the one hand and the Fifth, Eighth and Ninth Circuits on the other, in respect of the transferee issue involved, thus preparing the way for almost certain review of that particular issue by the Supreme Court.

I.

Taxpayer Alone Had the Benefit of the Debt to the United States Upon Which the Interest Accrued.

The Thomas H. Collins estate was fully distributed July 20, 1938, only thirteen months and seventeen days after Thomas H. Collins' death, and nearly a month and a half prior to the date (September 3, 1938) when the estate tax return was due [R. 9], and prior, correspondingly, to the time when interest on the deficiency *commenced* to accrue. Fifteen months later, on October 20, 1939, Mrs. Collins paid \$129,500 of a proposed deficiency of \$130,-116.66 [R. 10], paying in addition the interest [R. 11], which the Commissioner now contends she had no right to deduct. Under these circumstances it is manifest that the *estate* received no benefit from the somewhat involuntary loan which Mrs. Collins caused the United States to make to her when she, as executrix, failed to pay the entire tax when due. The estate's income was not enhanced by gainful employment of this borrowing. Except in an attenuated and incorporeal form (the executrix not having received formal discharge) the estate had ceased to exist. From September 3, 1938, to October 20, 1939, Mrs. Collins, sole distributee of the estate, had the entire benefit of the moneys withheld. Those moneys were presumably invested by her, yielding income on which she paid taxes to the government. And in addition she paid six per cent interest on the loan. This seems to have been not a bad investment for the government. The language of the Board in *Harvey M. Toy*, 34 B. T. A. 877, 881-2 (again referred to under II, *infra*) is apropos:

"After the distribution of the property to petitioners, they were the owners of the income therefrom.

Had they then paid this indebtedness, which included both tax and accrued interest, no further interest would have been due. The interest on that debt thereafter accrued because of the petitioners' delay or withholding of payment of the obligation which constituted a lien on their property."

See also cases cited under III, *infra*, upon the point that the person really and ultimately (though not in form), liable for payment of a debt is entitled to the interest deduction.

Having obtained the use of the funds, it was proper that Mrs. Collins should pay interest. Having paid the interest, and having, presumably, paid taxes on the accretion to her own income arising from the use of the government's money, it seems proper that Mrs. Collins should obtain the claimed deduction. We hesitate to speak of the equities in a tax case, but no court has ever held that a taxpayer need be embarrassed by having justice on his side. We are happy to say that the United States lost no money—it may even have profited—because of the way in which Mrs. Collins handled this transaction.

Since, therefore, the person paid the interest who got the benefit of the loan, her right to deduct the interest should follow as of course unless there is some principle which constitutes a positive bar. Is there such a principle? The Commissioner contends that there is, saying, in effect, that the obligation to pay the tax—and, therefore, the interest—was that of the "estate": that the taxpayer, paying this debt, was discharging an obligation not her own; that she was, in this transaction, a sort of volunteer. This brings us to our second point.

II.

The Estate Tax Debt to the United States Was Taxpayer's Personal Obligation, Because of Her Act in Distributing the Estate.

It is clear enough that interest paid by one person on the obligation of another is not deductible for income tax purposes. *Colston v. Burnet*, 59 F. (2d) 867 (App. D. C.), cert. den. 287 U. S. 640. But there is no simple, unfailing rule by which it can be determined who is the obligor and entitled, therefore, to the interest deduction. That is a matter of the substantive law applicable to the particular case.

The substantive law applicable here determines that Mrs. Collins was the obligor. When she, as executrix, distributed the estate without payment of the tax due the United States, she subjected herself to the liability imposed by a statute almost as old as the Constitution itself, the former Sec. 3467 R. S., now 31 U. S. C. A. Sec. 192, a statute of 1799.

That section, quoted above, provides that any fiduciary, including an executor, who pays debts of the estate before paying debts due the United States, "shall become answerable in his own person and estate for the debts so due to the United States, or so much thereof as may remain due and unpaid." Although this statute speaks of "debts" due by the person or estate for whom the fiduciary acts, it has been construed as making an executor or trustee liable if he *distributes* the estate or trust property without paying claims which are at least known to be due to the United States. *United States v. First Huntington National Bank*, 34 F. Supp. 578 (D. C., W. Va.: estate tax), aff'd on the opinion below, 117 F. (2d) 376

(C. C. A. 4); *Helen Dean Wright*, 28 B. T. A. 543 (1933; estate tax; distributees, heirs at law, also liable): see also *Anderson v. United States*, 15 F. Supp. 216 (Ct. of Cls.), cert. den. 300 U. S. 675; *United States v. Cruickshank*, 48 F. (2d) 352 (D. C., N. Y., 1931); and see Reg. 105. Sec. 81.99, quoted *infra*, p. 13.

In *United States v. Weisburn*, 48 F. Supp. 393 (D. C., Pa. 1943), the widow of a decedent who paid debts of the decedent before she paid income taxes due from him, leaving an amount insufficient to pay those liabilities, was held personally liable for amounts paid on debts of decedent over which the United States had priority. As executrix she was held liable for the amount of estate funds remaining in her hands.

The Board of Tax Appeals applied R. S. 3467 to a situation identical with the present in *Harvey M. Toy*, 34 B. T. A. 877 (1936; non-acq.), holding that when the administrators of an estate distributed to themselves as sole beneficiaries the assets of the estate without paying the federal estate tax and later satisfied the liability, paying interest on it, they could deduct the interest. The decision was rested on the administrators' personal liability under R. S. 3467. Although the holding in that case is impliedly disapproved in this Court's recent decision in *Commissioner v. Green*, 148 F. (2d) 157, we respectfully suggest that the Court may wish now to examine that point, and perhaps to reconsider a conclusion reached without the benefit of argument on behalf of the taxpayer and without having the relevant authorities brought to its attention—a matter presently to be referred to.

Although the point is by no means indispensable to maintaining our position, we believe it to be clear that

by distributing her deceased husband's estate without payment of the tax due the United States, Mrs. Collins incurred a liability which was identical with the original tax liability. She became "answerable" for the *original debt* due the United States, not for a new debt in the nature of a penalty created by the transfer. This seems implicit in *United States v. Moitsinger*, 123 F. (2d) 585 (C. C. A. 4)—an action against a trustee to whom assets of the taxpayer had been transferred in trust and who had distributed them without paying taxes assessed against the taxpayer. The question was one of limitations, and the action was held not maintainable because not brought within six years after assessment. Discussing the nature of the fiduciary's liability, the Court says that "the proceeding under 3467 is nothing more than one to collect the tax of the taxpayer out of the fiduciary." Again the Court speaks of "the patent fact that it is in reality *the old tax liability of the original taxpayer* which is being enforced against the fiduciary." (Emphasis ours.) Quoting from the *First Huntington National Bank* case, *supra*, p. 8, the Court says,

"While this suit is against the fiduciary personally, it is nevertheless a proceeding in court to collect the identical tax which was previously assessed against the estate." (Emphasis the court's.)

The court cites *United States v. Updike*, 281 U. S. 489 (1930) to which we shall refer later.

The principle that the person who distributes an estate without paying debts due the United States steps into the debtor's shoes, becoming subject to his burdens and entitled to his incidental benefits, if any, receives additional support from the cases cited under the next heading. They are in fact *a fortiori* authorities sustaining that prin-

ciple, for reasons which will be stated below. But before proceeding to another point, we wish to notice the treatment of the R. S. 3467 contention in the case of *Commissioner v. Lawrence R. Green*, 148 F. (2d) 157 (1945).

Regarding this matter, the Court says in the concluding paragraph of its opinion:

“We are not impressed by the suggestion, apparently made for the first time in petitioner’s brief, that his status, as former executor of his father’s estate, changes materially the nature of *his liability*, under the facts of this case. See Sections 3466 and 3467 Revised Statutes, Sections 191 and 192, 31 U. S. C. A. The *father’s estate* was solvent. Nothing is shown to indicate that debts of the estate were paid at such times and in such manner as to prejudice or jeopardize the estate tax claims of the Government. The Commissioner asserted a tax deficiency against petitioner, as a transferee of his father’s estate, and not otherwise. The case was tried in the Tax Court on that theory. See 3 T. C. 74.” (Emphasis the Court’s.)

Now the “suggestion” by which the Court was quite properly “not impressed” is contained in the following two sentences quoted from page 24 of Green’s brief:

“Sec. 3467, Revised Statutes, provides that every executor who paid any debt of the estate without paying debts to the United States from the Estate ‘shall become answerable in his own person and estate’ for the amount of debts due to the United States. As hereinabove pointed out such personal liability is not necessary to make the estate tax deficiency an indebtedness under Sec. 23(b), but if such personal liability is necessary, then the taxpayer in this case had such personal liability.”

The excerpt quoted *constitutes the entire argument* which the taxpayer in the *Green* case made, in this Court, or in the Eighth Circuit, on this important and difficult subject.¹ The Attorney General filed a twelve page reply to the “argument” just quoted. In his brief in the instant case, the Attorney General says:

“The taxpayer argued, in the alternative, before the Tax Court, as did the taxpayer on appeal in the *Green* case, *supra*, that Section 3467 of the Revised Statutes (Appendix, *infra*), imposed a tax liability on her, as executrix, for having paid over the assets of the estate to herself before satisfying the estate tax in full. Accordingly, it was contended that the taxpayer, in paying interest on the deficiency, had paid interest on her own indebtedness which was deductible under Section 23(b).”

We have already pointed out the extent to which the taxpayer in the *Green* case “argued” and “contended” regarding this matter.

The casual treatment of this matter by the certified public accountant who wrote the briefs in the *Green* cases undoubtedly accounts for the fundamental misconception—we say it with deference—which the excerpt above quoted from this Court’s opinion in the *Lawrence Green* case shows regarding the purpose and effect of R. S. 3467. That excerpt indicates the Court’s belief that R. S. 3467 becomes operative only when the fiduciary pays *debts*, ignoring the claims of the United States. The authorities cited above, p. 8, and the Commissioner’s own regulations (see *infra*) conclusively prove the contrary. The Court remarks, “*The father’s estate was solvent*” (italics

¹The facts regarding this matter are set forth in the Appendix.

the Court's). Original solvency is of no consequence if by *distribution of all assets of the estate without paying debts due the United States it becomes insolvent*. As in the case of a transferee's liability (see *Baumgartner v. Commissioner*, 51 F. (2d) 472 (C. C. A. 9, 1931, cert. den. 284 U. S. 674), everything necessary to fix the fiduciary's liability has transpired when it appears (or is admitted, as in the instant case) that distribution has been made without paying taxes. To hold otherwise would limit the applicability of R. S. 3467 to cases where the estate is insolvent while in the fiduciary's hands, not extending it to cases where the fiduciary's own conduct in making a premature distribution renders it insolvent. That the Attorney General, charged with the duty of protecting the interests of the United States, should sponsor such a theory passes the bounds of credibility. That a court of the United States, advised of the consequences, should uphold it, seems improbable in the extreme.

The *Treasury* does not read into the statute the limitation implied in this Court's opinion in the *Lawrence Green* case. In Reg. 105, Sec. 81.99, it is provided:

"If the executor, before paying all the estate tax, pays, in whole or in part, any debt due by the decedent or the decedent's estate, *or distributes any portion of the estate*, he is personally liable, to the extent of such payment or distribution, for so much of the estate tax as remains due and unpaid." (Emphasis supplied.)

The emphasized portion of the above quoted regulation first appeared in Article 102, Reg. 80, approved November 7, 1934. In Reg. 70, in effect from 1926 to 1934, the Treasury construed R. S. 3467 as this Court apparently construes it in the *Lawrence Green* case, but that construc-

tion was abandoned by the Treasury eleven years ago. We respectfully ask the Attorney General to inform the Court in his reply whether he is of the opinion (1) that the emphasized portion of the regulation quoted above was inserted erroneously, and (2), whether he thinks a personal representative has the right to *distribute* an estate to devisees and legatees—mere volunteers—without incurring personal liability to the United States for unpaid taxes, while incurring personal liability if he pays *creditors*—persons holding an equity superior to the decedent and those claiming under him.

The Commissioner in the instant case makes no argument based on Sec. 3467, further than to refer (Br. p. 8) to his reply brief in the *Lawrence Green* case, and to say that:

“While * * * it is the Commissioner’s contention that Sections 3466 and 3467 of the Revised Statutes (Appendix, *infra*) do not impose any tax liability on the executor, it is no more necessary to decide this question in its broadest aspects here than it was in the *Green* case, for here, as there, no proceedings were instituted against the taxpayer under Section 3467; the taxpayer did not even purport to pay the deficiency in her capacity as executrix [R. 18]; and there is nothing to show that the estate tax claims of the Government were prejudiced or jeopardized when the taxpayer, as executrix, transferred to herself, as residuary legatee, assets which greatly exceeded the Government’s tax claim.”

In the brief statement just quoted, the Commissioner makes three patently erroneous assumptions: *First*, that Section 3467 has no application unless the Commissioner institutes proceedings under it. Section 3467 and the

Commissioner's own regulations under it, quoted above, establish the contrary. Mrs. Collins by distributing the estate without payment of the tax became personally liable for it. The Commissioner's acts or omissions can not change the law.

As this Court said in *Baumgartner v. Commissioner*, 51 F. (2d) 472, 473 (1931; cert. den. 284 U. S. 674):

“* * * The yardstick by which revenue taxes are measured is the United States revenue laws, and not the acts of government officers. * * *”

Second, “that the taxpayer did not even purport to pay the deficiency in her capacity as executrix.” Of course not. If she had paid the tax *as executrix* obviously she couldn't claim the interest deduction *as an individual*. She is claiming the deduction in the capacity in which she paid—the only capacity possible, since *as executrix* she had no funds or property when she paid the tax. ✓

Third, that there is nothing to show prejudice or jeopardy to the Government's tax claims when the taxpayer, as executrix, transferred the estate property to herself. The fact that, due to the taxpayer's personal responsibility and honesty, no *actual* prejudice resulted is a fortunate but immaterial circumstance. The statute locks the door before, not after, the horse has been stolen. The Government's rights against Mrs. Collins accrued when she distributed the estate. Their vesting or determination was not stayed until it was ascertained whether Mrs. Collins was going to pay her debt to the United States or squander the assets in riotous living. The Commissioner's contention is contrary to the statute, his own regulations, and the interests of the revenue.

We note in passing that this Court in the *Lawrence Green* case seems to have been misled by a similar sophistry. In the excerpts quoted above, p. 11, the Court after referring to the R. S. 3467 "suggestion" of the taxpayer, says at the end of its opinion, "The Commissioner asserted a tax deficiency against petitioner, as a transferee of his father's estate, and not otherwise. The case was tried in the Tax Court on that theory." We submit that the manner in which the Commissioner asserts deficiencies does not change the law. The *statute* creates liabilities, that is to say, debts. The Commissioner can assert or not assert them as he sees fit. Of course, the taxpayer can *waive* a defense by not urging it. Perhaps that is what the Court meant in its concluding sentence. There was no such waiver here. Respondent has at all times insisted on all her legal rights.

The Commissioner's reply brief in the *Lawrence Green* case discusses, pp. 5-12, Sections 3466 and 3467, R. S., 31 U. S. C. A. 191 and 192. We have no quarrel with most of that discussion. The statement, p. 9, that "no one would contend that if the debt due the United States by the decedent or his estate was on a contract, the executor would by virtue of these sections be substituted for him or it as a party thereto," is plainly wrong if it is intended to say that an executor distributing an estate or depleting an estate by paying claims, without paying a debt due the United States, would not be liable to the latter on a non-tax liability of the decedent to the United States. The Supreme Court cases cited by the Commission prove the contrary. No one, we assume, would contend that "the executor is *substituted* for him or it as a party thereto" (Reply Br. pp. 9-10). The statute says nothing about *substitution*. It says the executor "shall

become answerable." If the Commissioner's perhaps inadvertent use of the word "substituted" is disregarded, and the quoted statement construed as meaning that the executor making the wrongful distribution does not become liable for payment of the original debt, then the statement that there is "nothing in the decisions of the Supreme Court or of those of the lower federal courts which justifies a contrary conclusion," is *first*, erroneous, as we have shown in discussing R. S. 3467; and *second*, even if a correct, it would be an immaterial conclusion. It is sufficient that the executor becomes a debtor to the United States, by whatever route. What difference does it make whether it was the original debt the executrix became liable for, or another debt just like it? This argument belongs in the category of quibble, hardly rising, we submit, even to the dignity of "elusive and subtle casuistries," toward which the Supreme Court has rightly manifested such impatience (*Helvering v. Hallock*, 309 U. S. 106, 118).

Section 3466 was intended to give the United States priority against insolvent estates. Section 3467 put teeth in 3466 by making fiduciaries paying debts due by the persons or estates they act for personally liable for the latter's debts to the United States. In accordance with obvious intent, and in order to close the door to facile evasion, the courts and the Commissioner himself have construed the provisions of 3467 as being applicable to executors who render estates insolvent by distributing to heirs or legatees, as well as to those who merely pay debts. No sophistry can evade the fact that a person who is "answerable in his own person and estate" for a debt is a debtor. He owes an "indebtedness." No exor-

cism, no administrative or judicial magic, can expunge the provisions of Section 23(b) I. R. C., allowing deduction of interest paid on "indebtedness."

The substance of the Attorney General's argument on 3467 is comprehended within the paragraph on page 7 of his reply brief in the *Green* case, where he says that while Section 3466 was designed to give the United States priority in the payment of debts where the property of an insolvent debtor is in the hands of an assignee or other fiduciary, Section 3467 was designed to impose personal liability upon the fiduciary, to insure the Government's priority in the event he disposed of the debtor's property without having first discharged the debt.

We agree. But what of it? Undoubtedly 3466 and 3467 were alike intended to render more certain the collection of debts owing to the Government. There is nothing in either of these sections or in the two considered together to give rise to any inference that a fiduciary who is compelled to pay debts due the United States because he has distributed property without paying them, is not, in making such payments, discharging an "indebtedness." The statute, in saying that the fiduciary "shall become answerable in his own person and estate," *says it is a debt, and that it is his debt.* The Supreme Court's statement in various cases cited by the Attorney General that the assets of the debtor are considered as a trust fund, means that the fiduciary is under an obligation to dispose of them for the benefit of the United States, the primary beneficiary of the "trust." If he violates that duty, the statute makes him personally liable; he becomes himself a debtor of the United States. His violation of a species of trust makes him no less a debtor, nor does the fact that he may have distributed the assets to himself. These are aggra-

vating circumstances, if anything. We repeat that whether the debt which the fiduciary is obligated to pay is the debt of the estate or some new debt which by the very fact of distribution he brings into existence, is beside the point. Whatever its origin, *the debt is his under the very terms of the statute*. And if he pays interest upon it, he is paying interest on his own indebtedness. The language of the Third Circuit in the recent *Breyer and Koppers Co.* cases, F. (2d), 1945 Prentice-Hall Federal Tax Service, Par. 72,657, 45-2 USTC Par. 9398 (Aug. 31, 1945) used with reference to a transferee's liability is also apropos here:

“* * * the Tax Court found no difficulty—nor do we—in concluding that the interest paid by the transferees was interest upon their own indebtedness, and this without regard to whether their obligation was a primary or secondary obligation. See *Scripps v. Commissioner*, 96 Fed. (2d) 492 (C. C. A. 6).”

What does it matter whether when he pays tax and interest he is paying *qua* tax or not? The cases cited by the Attorney General show that the applicability of these statutes is not limited to taxes. Although the Attorney General (Reply Brief, *Green* case, p. 9), seems to say the contrary, they apply to all debts due the United States. Fiduciaries making distribution without paying debts due the United States become liable for—they assume—those debts. Stepping into the debtor's shoes, they bear the debtor's burdens and are entitled to such incidental privileges as he may have had.

The Commissioner (Reply Brief, *Lawrence Green* case, p. 11) says:

“So far we have sought to show that Section 3467 imposes no more than a liability in equity under the trust fund doctrine, or at law for money had and received, from which it necessarily follows that such liability is merely measured by the tax and interest owing by the decedent or his estate. So that whatever may be collected from the fiduciary by way of interest is collected as a part of such liability and not *qua* interest.”

The statement that “Section 3467 imposes no more than a liability in equity under the trust fund doctrine,” is, we submit, erroneous. The statute, in order to discourage or prohibit conduct injurious to the revenue—payment of debts or a distribution which leaves the estate insolvent—makes the fiduciary “answerable.” No doubt there is a “ceiling” on his liability, namely, the amount wrongfully paid out or distributed, plus future interest. That obviously measures the extent of the wrong to the United States. Any exaction above that amount would be purely penal.

Note that in 3467 cases the fiduciary is not being asked to “disgorge” anything. He is liable because he distributes, not because he receives. The Government is not following a trust fund, as it may be said to do in transferee cases. Even in the latter class of cases, the so-called trust fund theory introduces only an element of confusion, diverting attention from the real point at issue, as the quotation, p. 38, *infra*, from the Third Circuit’s opinion in the *Breyer and Koppers Co.* cases shows. In 3467 cases, the fiduciary is liable for principal and interest, though he receives nothing. Trustees are ordinarily accountable only

for what they receive. As to the *estate*, yes, the executor is a fiduciary, in a sense a trustee, for the United States and all other creditors. The statute, to insure his fidelity as far as the United States is concerned, *makes him personally liable*. That is the extent of the "trusteeship" (*Bramwell v. United States Fidelity & Guaranty Co.*, 269 U. S. 483). Trusteeship is the origin, the occasion, of the liability, but the latter is personal, not fiduciary.

Nor is it correct to say that the liability is "at law for money had and received." (Reply Brief, *Green* case, p. 11.) Section 3467 applies although the fiduciary himself receives nothing. A fiduciary accountable for only \$1,000 received by the estate from the decedent and paying it out without satisfying the claims of the United States would be liable for \$1,000 *and interest thereon*. Is the Attorney General willing to sponsor the opposing theory? If he is, we invite him to explain how that position can be made to conform with the needs of the revenue or the provisions of the statute creating personal liability.

We have deemed it unnecessary to make the digression necessary to comment further on the authorities cited in the Commissioner's reply brief on R. S. 3467 in the *Lawrence Green* case. It is sufficient to note that none of them supports the Commissioner's present position, and at least one case, *Phillips v. Commissioner*, 283 U. S. 589 (1931), is definitely against him, both on this and the transferee issue. Aside from such comfort as the Commissioner may derive from this Court's decision in the *Lawrence Green* case, 148 F. (2d) 157, or from the *Hunt Henderson* case, 147 F. (2d) 619, he will search in vain for a decision holding that a person "answerable in his own person and estate" for a debt is not a debtor.

The *Green* cases, as we have shown, were both decided on the Commissioner's *ex parte* showing. In the *Henderson* case, the court mentions, but does not discuss, Section 3467, going on the erroneous theory that the Commissioner, because he "sought to enforce no statutory substantive rights," abated something from the personal liability which 3467 placed on the executor. We have already pointed out that the statute, not the Commissioner, creates liabilities. As we shall show later, we believe the Fifth Circuit was plainly in error on the transferee issue. But the decision, having given no consideration to the R. S. 3467 issue, is a feeble luminary on that point.

III.

The Estate Tax Debt to the United States Was Taxpayer's Personal Obligation Because of Her Act in Receiving the Estate.

Under II we discussed the effect of the fact that Mrs. Collins as executrix *distributed* the estate. Here we shall consider the effect of the additional fact that she also *received* it. In receiving the estate she was obviously a transferee. We shall therefore discuss taxpayer's rights and liabilities flowing from her transferee status.

Under certain recent decisions, a problem which should be simple has become so encumbered with legalistic considerations that it appears difficult. Under Section 827 (b), I. R. C., as amended in 1942, if the estate tax is not paid when due, "then the spouse, *transferee*, surviving tenant, * * * to the extent of the value of such property, *shall be personally liable* for such tax." When this case (and the *Green* cases) arose, statutory provisions for personal liability applied only in the case of certain *inter*

vivos transfers (see Section 827, I. R. C. as originally enacted). Under Section 827(a) (quoted p. 2, *supra*), the property distributed to the taxpayer from her husband's estate was subject to the estate tax lien. Therefore, in paying the tax, she was discharging a lien on her own property, and even though she had not been personally liable for the tax, she was entitled to the deduction under a principle recognized in the Commissioner's own regulations. (Reg. 111, Sec. 29.23 (b)-1, identical in this respect with Reg. 101, Art. 23 (b)-1, in effect in 1939, quoted *infra*, p. 28.)

Not only was taxpayer's property subject to the estate tax lien. Under principles well settled long before the amendment to Section 827 (b), I. R. C. (see *Neustadter v. United States*, 90 F. (2d) 34, C. C. A. 9, and other authorities cited under this heading, and in Note 3, *infra*), she was personally liable for the tax. It was her "indebtedness." The tax is a "debt" (*Price v. United States*, 269 U. S. 492, 499). A person personally liable for a "debt" owes an "indebtedness." Since Section 23 (b) allows as a deduction all interest paid on "indebtedness," the interest here in question is deductible by express provision of the statute, subject to the further qualification, immaterial here, that the transferee is personally liable only to the extent of (that is, the indebtedness—principal—cannot exceed) the value of the property received. In this case the property which Mrs. Collins received from the estate was found by the Tax Court to be "substantially in excess" of the tax liability [R. 12]. The distributions totaled \$1,417,790.84. The tax as finally determined was \$199,400.97 [R. 9-10].

It should be possible to rest the case here.² But certain recent decisions, including the *Lawrence Green* case decided by this Court, render it necessary to pursue the subject further.

The following principle runs through and is consistent with all the cases upon deductibility of interest, namely, that where by law or contract a liability for an obligation is imposed upon or assumed by a person, interest paid by that person is deductible. It is unimportant that the liability is shared by another, if payment of the interest is made pursuant to a legal liability. (*George A. Neracher*, 32 B. T. A. 236 (1935; joint and several note; acq.); *Laurence B. Halleran*, C. C. H. Dec. 12,813-B (Aug. 10,

²An experienced commentator on tax subjects says of *Commissioner v. Lawrence R. Green*:

"Where a person pays interest on the indebtedness of another as a volunteer, he is not allowed a deduction for the interest so paid for the reason that he is not paying interest on his own indebtedness. However, that wasn't the situation here. The taxpayer had a definite liability for both the deficiency and the interest accrued thereon, consequently was in the same position as the principal debtor. The principal debtor was the estate, and, under I. T. 1317, C. B. 1-1, an estate in process of administration is entitled to deduct from the gross income of the estate the interest paid on the estate tax. Since the transferee here stepped into the shoes of the principal debtor and since the Estate itself, the transferor, would have been allowed a deduction for interest paid, it is unfair, unjust and most unconscionable to disallow a deduction to the transferee for interest paid by him." (Par. 4083, *Alexander Tax News Letter*, March 24, 1945.)

The following, also from an experienced and impartial source, is further illustrative of the reaction of the tax bar to the *Green* decisions. The following comments relate to *Commissioner v. Ralph J. Green* but they are equally applicable to the *Lawrence Green* case:

"Seemingly, the opinion of the Eighth Circuit is confined in its inquiry, and totally disregards the legislative history of the transferee section of the Code, upon which the decision of the

1942: joint and several note; appealed, C. C. A. 2); G. C. M. 15,530, XIV-2 C. B. 107 (1935).) So, in the present case, it is immaterial that a continuing liability for payment of the tax may have rested upon the executrix, *as such*, or upon the *estate*, if such an entity could be said to exist after the distributions were made.

In fact, the cases, going further in allowing interest deductions than it is necessary to go in order to uphold the taxpayer's contention here, have allowed deductions to taxpayers who had no *liability* at all to pay interest on a tax deficiency but were indirectly or derivatively charged with it under local law or the terms of particular trusts.

Tax Court so convincingly predicated its conclusions. None of these cases reviewed ever pointed out the Commissioner's regulations on interest deductions, which are analogously pertinent. In Sec. 29.23 (b)-1 of Regulations 111 it is found:

"Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or mortgage secured by such mortgage, may be deducted as interest on his indebtedness."

"It is apparent in such an instance, although the taxpayer has not assumed the payment of the note or bond secured by the mortgage, he has assumed the ownership of the property and if he does not pay the interest or the installments on the principal, the property will be directly subject to attack, distraint, or foreclosure, and he will lose his interest therein. Is the situation any different where an heir takes distribution of an estate's assets which become subject to an estate tax lien and accrued interest? To protect his distribution, although the taxpayer is not originally and directly liable for the taxes and interest, nevertheless he pays the same to protect the assets in his hands. To the point of time of distribution of the assets the debt is that of the estate, but after distribution it is the debt of the taxpayer so far as the accrued interest thereafter on the debt is concerned, because then such accrued interest is the taxpayer's debt if he wishes to hold and protect the property he has received as an heir." (Rewrite Bulletin, Par. 8355, 454 C. C. H. Standard Federal Tax Reports, Feb. 14, 1945.)

In *Penrose v. United States*, 18 F. Supp. 413 (D. C., Pa.) it was held that interest on an estate tax deficiency paid, pursuant to local law, out of trust income, is deductible in computing the net distributive share of a beneficiary of the trust.

In *Scripps v. Commissioner*, 96 F. (2d) 492 (C. C. A. 6, cert. den. 305 U. S. 625) it was held that where the trustee of an *inter vivos* trust was directed under the terms of the trust to pay federal estate taxes from income or principal of the fund, interest on estate taxes was an allowable deduction. The court says:

“But we have no difficulty in concluding that the interest paid by the trust was interest upon its indebtedness, and this without regard to whether its obligation was a primary or a secondary obligation. The liability was specifically imposed upon it by the taxing law, and its property was subject to government lien. [Sec. 315 (a), (b).] Had it borrowed the money with which to pay the tax there would then have been no question of its right to deduct interest on the indebtedness. We see no question of that right in the present situation.”

A case involving an indirect liability for interest is *Sterling Morton*, 38 B. T. A. 1270 (1938), aff'd on another point in 112 F. (2d) 320 (C. C. A. 7). It was held that where the taxpayer was a member of a syndicate formed for the purpose of financing a corporation, and the syndicate by its manager borrowed money and executed a note, the taxpayer paying his *pro rata* share of the interest on the note to the corporation, which in turn paid it over to the payee, was entitled to a deduction for such interest. The Board, page 1273, refers to the fact that under the law of Illinois each member of the syndi-

cate was liable on the note as a primary obligation, and that it was enforceable against the members.

In *United States Fidelity and Guaranty Co.*, 40 B. T. A. 1010 (1939; acq.), it was held that a loan made by the R. F. C. to the taxpayer's subsidiary but actually for the taxpayer's benefit, justified deduction of interest payments to the R. F. C. as interest paid on the taxpayer's obligation. The subsidiary's position was held to be that of an accommodation maker, and the taxpayer the real debtor, having received the funds borrowed. "The obligation * * * was the equitable liability of the accommodated party, in this case the petitioner." (P. 1018.)

In *The New McDermott, Inc.*, 44 B. T. A. 1035 (1941), the Board said (p. 1040):

"Petitioner received the apartment property from the General Investment Co. by warranty deed, subject to the mortgage in favor of the bank as trustee for the bondholders. Petitioner did not assume the mortgage until after the taxable year. We are nevertheless of the opinion that the indebtedness was that of petitioner within the meaning of the authorities which require the debt to be that of the taxpayer in order to support an interest deduction. Cf. *Joell Co.*, 41 B. T. A. 825. The mortgage indebtedness is a lien on the property of which petitioner is the legal owner and upon which petitioner must necessarily rely for its source of income. Petitioner's whole reason for being would be negated if the mortgage were foreclosed and the property sold to satisfy the mortgage. Interest accrued on the mortgage is interest on petitioner's indebtedness in spite of the fact that petitioner was not primarily liable on the mortgage."

A principle broad enough to cover the present case is recognized by the Commissioner in his regulations. In Reg. 101, Art. 23(b)-1 (1938), now Reg. 111, Sec. 29.23(b)-1, it is provided:

“Interest paid or accrued within the year on indebtedness may be deducted from gross income * * *

“Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness. * * *”

Applying this principle to the present case, Mrs. Collins was the “owner” of the property distributed from her husband’s estate. It was subject to the lien created by Section 827 (a), I. R. C. The incongruity of attaching to a lien created by private agreement greater consequences than are accorded to an Act of Congress, is commented on below.

From the above, it appears that interest may be deductible by a taxpayer (1) whose liability is indirect (*Sterling Morton*); (2) whose liability is only equitable (*United States Fidelity & Guaranty Co.*); (3) who has no liability whatever, but suffers a deduction of the interest under local law (*Penrose*), or the terms of a private trust (*Scripps*); whose property is subject to a lien not assumed by the taxpayer (*New McDermott, Inc.*; Reg. 111, Sec. 29.23(b)-1). Coming closer to the immediate problem, interest is deductible when paid upon an obligation (federal estate tax), which, as here, *constitutes a lien* against property in the hands of the taxpayer. (See

quotation, p. 26, above, from *Scripps v. Commissioner*.) On this point, the Board in the *Toy* case says, 34 B. T. A. at page 882:

"Under these conditions, the situation is not different from that where one receives property, *assuming the payment* of a mortgage thereon. The property is burdened with an obligation to pay the mortgage debt and, as long as such recipient withholds satisfaction of this debt, he must pay the interest specified. We know of no case, in computing net income, where the owner's right to deduct interest paid by him on a mortgage encumbering his property, which accrued since he became the owner, has been questioned. Manifestly, he has that right. The interest paid is a fixed and stated sum, payment of which is required for the withholding of the payment of the indebtedness. The owner has an equity in the property represented by its value in excess of the mortgage, but he is holding and using the entire value. See *Brons Hotels, Inc.*, 34 B. T. A. 376. The fixed amount the owner pays as interest to the mortgagee is interest for the retention, use and enjoyment of that portion of the total value represented by the mortgage debt. *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552, *Fall River Electric Light Co.*, 23 B. T. A. 168. That situation seems indistinguishable from the one presented here except that there the obligation to pay the mortgage and interest is specifically assumed, *while here the same character of obligation is fixed by law*. Here, as in the instance where a mortgage is specifically assumed the obligation of the petitioners is a personal obligation under section 3467 of the Revised Statutes, *supra*." (Emphasis supplied.)

Is it conceivable that an "obligation fixed by law"—and by federal law—is *less* of an obligation as far as the taxpayer is concerned—and therefore more unfavorably situated in respect of the deductibility of interest upon it—than an obligation privately assumed? An affirmative answer to this question, necessary if the Commissioner's position in this case is to be sustained, would carry consequences serious to the Government itself. It would amount to saying that Congress, exercising its power as the supreme law-giver of the land, cannot compel transferees to assume, *and become personally liable for*,³ liens created by law, while conceding that power—and the consequences flowing from its exercise, as the cases above cited show—to private persons, and to state laws. We think the Commissioner is wrong in so attempting to circumscribe the powers of Congress, whose servant he is. We believe (1) that the lien or liability created by Congress, higher in origin, is at least as high in rank as a lien or liability created by any state law or private contract; (2) that when Congress says a transferee *assumes* a liability, that assumption is at least as binding as any assumption effected under the provisions of any state law or private contract.

The point is that Mrs. Collins in *receiving*—as well as in *distributing*—the Thomas H. Collins estate became liable for the tax. The language of the Supreme Court

³On the personal liability, to the extent of the property received, of a distributee of an estate upon which the estate tax has not been paid, see *Sharpe v. Commissioner*, 107 F. (2d) 13 (C. C. A. 3); *Neustadter v. United States*, 90 F. (2d) 34 (C. C. A. 9); *Helen D. Wright*, 28 B. T. A. 543 (1933); *Commercial National Bank (Story)*, 36 B. T. A. 239 (1937; acq.); *Edna F. Hays*, 34 B. T. A. 808 (1936; acq.).

in *United States v. Updike*, 281 U. S. 489 (1930), involving a suit against stockholders of a dissolved corporation to collect income taxes due from the latter, is apropos:

“It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from Sec. 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of Sec. 278(d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, *it puts no undue strain upon the word ‘taxpayer’ to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden.* Certainly it would be hard to convince such a person that he had not paid a tax.” (Emphasis supplied.)

So in the present case, the property which Mrs. Collins received was “impressed with a trust to that end.” She was therefore, the Supreme Court says, a “taxpayer.” Conceding as the Commissioner must, that the Thomas H. Collins estate, paying the tax and interest, could have deducted the latter item, it must follow that the distributee, who became the taxpayer in respect of this item, is entitled to deduct it.

In the later transferee case of *Phillips v. Commissioner*, 283 U. S. 589, 594 (1931), the court speaks of a transferee's liability in these terms:

“Section 280(a)(1) provides the United States with a new remedy for enforcing the existing ‘liability at law or in equity.’ The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. *The obligation to be enforced is the liability for the tax.*” (Emphasis supplied.)

Now a person who owes an “obligation” is a debtor. It matters not how he became a debtor. That a transferee becomes a debtor is wholly to the Government's advantage. If by virtue of his debtor status he occasionally gains an insignificant advantage, that is a necessary consequence of the position in which the Government, for its own protection and interest, has placed him.

In *Moore v. Commissioner*, 146 F. (2d) 824 (C. C. A. 2, 1945), the court says regarding the correlative provision of the Gift Tax Act (now Section 1009, I. R. C.):

“* * * While a tax lien is imposed by Section 510 a personal liability is also imposed by the same section. The property transferred was not subject to a lien such as a mortgage or a pledge existing at the time of transfer, but the gift was of the whole property upon which a lien was only imposed to the amount of the gift tax which became due thereafter.

The liability is personal and existed irrespective of any lien. * * *

See also *Neustadter v. United States*, cited Note 3, *supra*, where this Court held transferees to be subject to a personal liability for estate taxes, which survived even the expiration of the federal lien.

On the basis of the authorities to which the Court's attention has been directed, we respectfully submit that the decisions of this Court and of the Eighth Circuit in the *Green* cases are wrong, and are in conflict with *United States v. Updike* and *Phillips v. Commissioner, supra*, particularly when it is remembered that taxpayer took property subject not merely to a *trust* as in the *Updike* case, but to a statutory *lien* (Section 827(a), I. R. C.). The interest was paid to protect taxpayer's property, and this is sufficient, even without the personal liability which Section 827(b) now imposes in express terms, to entitle taxpayer to the deduction (*The New McDermott, Inc.*, p.

⁴It is stated, p. 4 of the Commissioner's reply brief in the *Green* case, that under 3467 the liability of a fiduciary extends to the value of the entire estate (we assume this means, the estate wrongfully distributed, not in excess of the Government's claims), whereas a transferee's liability is limited to the value of the property he has received; also that the defenses may be different, citing the *Moore* case, which held that the transferee of a gift is personally liable for gift tax thereon to the extent of the value of the gift; also that notice of transferee liability is timely if given within one year after the expiration of the three year period of limitation as to the transferor.

The *Moore* case does not aid the Commissioner. Note the Court's statement, quoted above, regarding personal liability, and that this "liability is personal and existed irrespective of any lien." The defenses are different, as the Commissioner says (p. 4), in that the Government has a year longer to pursue the donee than it had against the donor. It is difficult to see how a person subject to a liability for a longer time than another person remains liable for it is *less* of a debtor than the latter.

27, *supra*; see also authorities cited, pp. 24-25 *et seq. supra*, and in particular *Commissioner v. Breyer*, C. C. A. 3, Aug. 31, 1945).

We venture to suggest, with deference, that this Court and the Eighth Circuit were misled in the *Green* cases as a result of the taxpayers' understandable unwillingness to incur expense in presenting them [see letter of September 14, 1944, from W. E. Baird, quoted, Appendix, p. 1]; and that, as a consequence the entire problem ought to be re-examined. We make this suggestion with the better conscience because of the fact that the present case involves too little to make it of financial consequence, either to the taxpayer or to ourselves, and the further fact that the issues here presented are of unusual importance, presenting the possibility, almost the certainty (in view of the *Breyer* and *Koppers Co.* decisions) that they will ultimately go to the Supreme Court for review. The possibility—we would ourselves state it in stronger terms—that the *Green* case will be overruled will have presented itself to the Court, as will the further consideration that the overruling of that decision, if it occurs, should come most appropriately from the court that pronounced it.

The Commissioner in his brief in this case leans heavily on the *Green* cases. We trust we have shown that these cases are broken reeds, which will not sustain him. In his brief in the *Green* case, he made much of the alleged point that the taxpayer did not pay the tax "qua" tax, hence did not pay interest "qua" interest. We think the contention is fallacious and that the authorities cited under this heading and that immediately preceding conclusively disprove it.

But assume she did not pay the tax "qua" tax. Under R. S. 3467 she became answerable in her own person and

estate for the tax. Pretty clearly, that made her a debtor. It is not necessary to reason why or how she became a debtor. The word of Congress should be sufficient to establish both fact and status. Being a debtor, she had the right (23 (b), I. R. C.) to deduct interest on the indebtedness.

Let us consider her as a transferee. Here again, Mrs. Collins was personally liable; she was a debtor. It is unimportant how she got that way. We can start with the status which the law ascribed to her. If she was a debtor, her right to deduct the interest paid on the "indebtedness" follows as of course.

IV.

As a Transferee, Taxpayer Stepped Into the Shoes of the Estate, the Transferor.

We have quoted Section 900(a), I. R. C. (pp. 2 and 3, *supra*). Its income tax counterpart is Section 311(a). This statute relates solely to collection methods, making available against a transferee or fiduciary the same remedies which the Government would have had against the person originally subject to the deficiency.

This statute has to do with procedure only. It does not affect substantive rights. Congress, which presumably knew the meaning of its own language, said regarding Section 900, I. R. C. (Conf. Comm. Rept., 69th Cong., 1st sess., H. Rept. 356, 1939-1 (Part 2) C. B. p. 372, quoted in *Ralph J. Green*, 3 T. C. 74, 80):

"Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such

liability *as assumed by the transferee* except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed *and* interest at 6 per cent a year for reimbursing the Government at the usual rate for loss of the use of the money due it. * * *"
(Emphasis supplied.)

See also reference to this same Committee Report in *Commissioner v. Breyer*, F. (2d) (C. C. A. 3, Aug. 31, 1945).

Congress plainly intended that interest would go on as before, and that the transferee would have to pay it. The liability is "assumed by the transferee." Can language speak more clearly? To say that such payments are made "qua" something other than interest seems to us fallacious, and a direct negation of the legislative intent. To say that the Government *receives* a payment "qua" interest (as Congress does) but that the taxpayer *pays* it "qua" something else, seems to border on the incoherent.

We refer again to the following, all cited *supra*:

Phillips v. Commissioner, 283 U. S. 589, 594.

See quotation, *supra*, p. 32.

United States v. Updike, 281 U. S. 489 (1930).

In the *Updike* case, the question was whether a suit against the stockholders of a dissolved corporation to recover unpaid taxes of the corporation was a proceeding to collect a tax under Section 278 (d) of the 1926 Act (now 276 (c), I. R. C.). At page 494 of 281 U. S. the court uses the language quoted, page 31, *supra*.

See also *Scripps v. Commissioner*, 96 F. (2d) 492 (C. C. A. 6), cert. den. 305 U. S. 625, where the court, referring to payment of estate taxes and interest by a revocable trust (only secondarily liable for the tax), uses the language quoted *supra*, page 26.

The Third Circuit in the *Breyer* and *Koppers Co.* cases (..... F. (2d), 45-2 USTC Par. 9398, Aug. 31, 1945), has dispelled the fog in which the Commissioner has succeeded in enveloping these issues. Its conclusions are directly opposed to those reached by this Court in the *Lawrence Green* case, with the exception of the R. S. 3467 issue, which is not discussed, perhaps was involved only in a minor way, if at all.⁵ The absence of that issue (or the fact that the Court reached a decision in favor of the *Breyers* without reliance upon it), makes the Third Circuit cases *a fortiori* authorities against the Commissioner in the instant case.

In the *Breyer* and *Koppers Co.* cases, the Court concludes:

“* * * it is intended by the provision of the statute in question, Section 311, that transferees are to be treated the same as any other taxpayers and allowed the deduction for interest paid in the same way as the transferors would be allowed such deduction;
* * *”

Discussing this point, the Court calls attention to Section 311(a), I. R. C. (co-ordinate with Section 900 (a)), to the Conference Report on that section, quoted pages 35

⁵It is not clear to what extent 3467 was involved. In the *Breyer* cases, two of the executors (widow and son of the deceased), were also distributees. The estate seems to have been closed in October, 1939. The interest in question was claimed as deductible for 1938 and 1939.

and 36, *supra* (the liability for the deficiency "as assumed by the transferee"), and holds that "the liability of a transferee, resultant upon a transfer of assets, is an indebtedness on his part to the Government."

Continuing, the Court says:

"If interest on the deficiency is to be assessed against, and collected from, a transferee in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax, then such interest is to be collected subject to the allowance of that interest, as a deduction to the transferee, in the same manner as would be allowed to the transferor. Some cases appear to emphasize that because the liability for payment of a deficiency and interest thereon on the part of a transferor is secondary, it should not, therefore, be considered that he makes such payment on his own indebtedness. We can see no reason for uncertainty as to the right of deduction upon such ground."

Concerning the "trust fund" doctrine, which the Commissioner seems to consider applicable to the instant case, the Third Circuit says:

"As has been mentioned, the Tax Court held that denial to a transferee of a deduction for interest paid on a deficiency rested upon an attenuated and unjustified application of the trust fund doctrine. With this conclusion we agree.

"In some cases, it is said that when the transferee is required to pay a deficiency or interest thereon, he thereby 'disgorges'; that a transferee always holds the assets received in trust for creditors including the Government; that while some authorities hold that the tax procedure with respect to transferees brings into play the doctrine of fraudulent conveyances, nevertheless, the trust fund doctrine seems better to

fit the Congressional intent. These concepts and expressions, savoring of remedies for fraud and deceit, breach of trust, and similar procedures, seem inappropriate when applied to a situation like the one before us. In the first place, they are unnecessary to enable the Government to collect the deficiencies, penalties, and interest, from transferees; and legal fictions and constructive trusts are not usually availed of when rights and liability can be determined by application of a rule of law or statutory provision."

Referring to the fact that the Government has a lien under I. R. C. Sections 827 (estate tax) and 3670-3671 (general), and that "the liability of a transferee for payment of the taxes and interest thereon implies an indebtedness on the part of such transferee to the Government," the Court continues:

"* * * It can also be persuasively contended that it is as reasonable to consider the liability of transferees or distributees in the light of holders of property subject to a lien for taxes (and also personally liable thereon) as it is to consider them constructive trustees subject to being forced to 'disgorge' for fraudulent conduct or breach of trust; and this seems to have been the conclusion of the members of the Tax Court (then the Board of Tax Appeals) in the case of *The New McDermott Inc. v. Commissioner*, 44 B. T. A. 1035, where a deduction was allowed to a company which paid interest on a mortgage on property which it owned, although it had never assumed the mortgage."

The court further considers applicable the rule announced in *Dobson v. Commissioner*, 320 U. S. 489, according due weight to decisions of the Tax Court on matters coming within its province.

V.

Authorities Relied on by the Commissioner.

We have already referred to the cases of *Commissioner v. Lawrence R. Green*, 148 F. (2d) 157 in this Court, and *Nunan v. Ralph J. Green*, 146 F. (2d) 352, in the Eighth Circuit.

The only other case requiring mention is the recent Fifth Circuit case, *Commissioner v. Estate of Hunt Henderson*, 147 F. (2d) 619 (1945), involving interest on an estate tax deficiency paid by a transferee. Under heading No. II we have commented on that case in so far as R. S. 3467 is concerned. On the other point involved, transferee's liability, we submit, with deference, that the learned Fifth Circuit's opinion is self-demonstrative of the error into which the court was evidently led by the same red herring—Section 900, I. R. C.—which diverted the Eighth and Ninth Circuits from the trail. The court says in the *Henderson* case:

“Section 316(a)(1) of the Revenue Act of 1926 [Sec. 900, I. R. C.] provides that the liability, at law or in equity, of a transferee of property of a decedent for estate taxes and interest shall be assessed, collected, and paid, in the same manner as a deficiency. The Tax Court apparently construed this statute to create a personal liability against the transferee, and on that ground decided in favor of the taxpayers, but the statute does not attempt to declare, define, limit, or alter in any way, the substantive law relating to the liability of a transferee. It simply provides a summary administrative remedy for the enforcement of that liability, whatever it may be.”

The Tax Court did not construe “this statute to create a personal liability against the transferee.” It construed

the statute as leaving substantive liabilities exactly where they were under other statutes (see pp. 79-80 of 3 T. C.). It demonstrated the correctness of that conclusion by quoting from Congressional committee reports. Other provisions of law, hereinabove discussed, *fixed the liability for the debt and the interest upon the transferee*. The *Breyer and Koppers Co.* cases constitute, we believe, a sufficient refutation of the Fifth Circuit's opinion.

With deference, but with conviction, we state our firm belief that the *Green* and *Henderson* decisions are erroneous, the former for reasons which the history of the two cases makes plain, and for which the two courts concerned are in no way accountable.

We submit that the Tax Court, bringing to this case the legislative and administrative experience to which the Supreme Court refers in *Dobson v. Commissioner*, 320 U. S. 489, and dealing with "a subject that is highly specialized and so complex as to be the despair of judges" (*id.*, p. 498), has produced a result which takes into account the relevant statutes and is consonant with their requirements. This Court is now afforded the opportunity to align itself with the Third Circuit in reaching a conclusion which we confidently predict the Supreme Court will affirm.

Conclusion.

The Tax Court's decision should be affirmed.

Respectfully submitted,

JOSEPH D. BRADY,

WALTER L. NOSSAMAN.

Attorneys for Respondent.

October 2, 1945.

APPENDIX.

Recital of certain facts relative to the manner in which the Green cases were presented to this Court and to the Eighth Circuit.

It is regrettably necessary to point out that this Court and the Eighth Circuit were compelled to resolve the important and doubtful issues involved in the Green brothers' cases without the aid of counsel for the taxpayers. Both taxpayers were represented by an attorney acting in a purely nominal capacity, the actual presentation (on brief, there was no oral argument) being made by a layman. This Court's files (in connection with motion made by the Commissioner to stay proceedings in the *Collins* case until the *Green* case was decided, and our various steps taken in opposition thereto) will show these facts, but for the convenience of the Court we shall set forth the following facts disclosed by our letter of November 22, 1944 to the Honorable Curtis D. Wilbur, Senior Circuit Judge, copy of which was sent to the Honorable Samuel O. Clark, Jr., Assistant Attorney General:

The two *Green* cases were handled in the Tax Court of the United States by W. E. Baird, C. P. A., of Kansas City, Missouri. September 14, 1944, Mr. Baird wrote Brady & Nossaman as follows (in part):

"As I am only a C. P. A., I could not act as counsel before the Circuit Courts. The Green brothers were afraid that the litigation expense might be more than any tax saving. As I was familiar with the matter, I told them I would write draft of brief without much additional expense. It was arranged that they should select counsel to whom I could submit brief, which counsel could correct if he desired and file, and appear as counsel in the case, but I shall probably do most of the work on the brief."

On November 6, 1944, Mr. Baird wrote:

"I am enclosing copy of Brief for *Ralph J. Green* before the Eighth Circuit of the United States Circuit Court of Appeals. I have prepared a similar copy of brief and sent it to an attorney who is going to appear for Lawrence R. Green before the Ninth Circuit. I have received word from him that he has made small minor changes and is having the brief printed, but I do not have a copy of it as yet. * * *

On November 13th, he wrote:

"* * * I shall write Mr. Cranston that you desire copy of brief.

"In the meantime, I am enclosing copy of suggested paragraph which I sent to Mr. Cranston to be included between points VI and VII of *Ralph J. Green* brief. I do not know how much cutting or elaborating Mr. Cranston did with respect to that point before sending it to the printer."

The "suggested paragraph" (except for "It is contended herein that" in place of "As hereinabove pointed out") is the paragraph quoted above, page 11, from page 24 of *Green's* brief.

On November 16, 1944, Mr. Cranston wrote:

"* * * We are enclosing a copy of our Respondent's Brief which has just been printed. You will note that it is substantially the same as the Brief filed in the appeal involving the tax upon *Ralph J. Green*."

With our letter of November 22, 1944, we sent to Judge Wilbur, a copy of the *Ralph Green* brief in the Eighth Circuit, on which the name of A. Z. Patterson appears

as counsel for the taxpayer. The Court will observe that the briefs in the two Circuits are identical in substance, and are identical in form, except for what Mr. Baird refers to as "small minor changes." These affect phraseology only. For example, the attorneys in the Ninth Circuit case edited out of Mr. Baird's brief, references to "the law of equity," perhaps some other layman's expressions.

We repeat here a statement made in our November 22, 1944, letter to Judge Willbur, that we imply no criticism of the able lawyers who signed the Lawrence Green brief. They were following the instructions of a client who had too little at stake to justify incurring the expense necessary to present the case adequately. The same situation obtained in the Eighth Circuit.

No. 10877

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RING-LING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

VOLUME I.

(Pages 1 to 384, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

DEC 7 - 1944

PAUL P. O'BRIEN,¹
CLERK

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925 Pacific Southwest Bldg.

Los Angeles 14, Calif.

For Appellee:

DAVID C. MARCUS

416 Spring and Second Bldg.

Los Angeles 12, Calif. [1*]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-C

AMERICA OLVERA, also known as AMERICA
OLVERA POLLINGER,

Plaintiff,

-vs-

AL G. BARNES INC., a corporation, BARNES &
SELLS FLOTO COMBINED SHOWS, a corpora-
tion, RINGLING BROS. BARNUM & BAILY
COMBINED SHOWS INC., a corporation, JOHN
DOE ONE, TWO, THREE and FOUR, JANE DOE
ONE, TWO, THREE and FOUR, CORPORATION
ONE, TWO, THREE and FOUR,

Defendants.

AMENDED COMPLAINT FOR PERSONAL
INJURIES

Plaintiff complains and alleges:—

I.

That during all times herein mentioned the defendants and each of them are corporations operating and existing under the laws of certain states in the United States at present unknown to plaintiff. That when plaintiff ascertains the state of incorporation of each of said defendants, she will ask leave of Court to amend her complaint to insert same. That the defendants and each of them have been and are now engaged in the business of operat-

ing a circus and kindred attractions to the public at large in the County of Los Angeles, State of California.

II.

Plaintiff is informed and believes and therefore alleges [2] that the defendants and each of them are all identical in ownership, management and control.

III.

That on or about the 24th day of September, 1936 plaintiff and defendant, Ringling Bros. Barnum & Baily Combined Shows, Inc., entered into a written contract in words and figures as follows to-wit:

“ARTIST’S
INDEPENDENT CONTRACTOR
AGREEMENT

This Agreement made at- as of- Sarasota, Fla., this 24th — day of September, 1936 between Ringling Bros.-Barnum & Baily Combined Shows, Inc., hereinafter called the Show, and

America Olvera

hereinafter called Artist—

Witnesseth:

1. For the lump sum of Eighty (\$80.00)—Dollars per week, payable weekly for the season of 1937 commencing on or about the Artist sells to the show his act, and in addition to said sum accepts without charge from the show (While under canvas) meals, car-lodging and transportation, common and customary in the circus business.

The Artist represents that his act in the matter of props, apparatus, property and personnel is as hereinafter set forth, and shall be maintained as is, and as represented, throughout the season to-wit:

(Insert names of artist, troupe members; give description and detail of act.)

America Olvera to present balancing trapeze act of the same standard as presented during the season of 1936. [3]

A Charge of Five Dollars Weekly Will Be Made for Each Dog or Animal Pet Carried With the Show.

It is also agreed that if the Artist is re-engaged for the following season he shall not appear at any other circus, theatre or Wild West Show in the United States without the written consent of the Show.

The term "season" represents the operating period as fixed by the Show and compensation to the Artist is definitely understood as a lump sum for the season. Because of inability of the Show to determine with exactness in advance the length of the season, installment payments to the Artist are made on a weekly basis.

The word "Artist" where herein used shall embrace and include his entire act inclusive of the Artist and the personnel of his troupe.

(a). The option is given the Show to Renew This Contract for the Next Succeeding "season" upon same terms and contract price, by giving no-

tice to Artist 30 days prior to closing date; and the Show by agreement reserves the right to transfer and place the artist during the term or part term of this contract, with any other of its shows or circuses—under its ownership or management all the terms and conditions of this contract continuing, prevailing and obtaining.

2. It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc. are changes exclusively under control of, and for the convenience of the Artist, and in no particular modify or restrict the Artist's relations with the Show as independent contractor and that the privileges offered Artist by the Show for meals, car-lodgings and transportation [4] are optional, of which Artist at all times has the privilege of rejecting and enjoying without restriction the freedom of procuring elsewhere or otherwise his meals, lodging and transportation.

3. Twelve performances on secular days (together with Sunday performances when given) shall constitute one week's work.

Payment to the Artist shall be reckoned only from the date of the first public performance. The Artist shall receive no payment for rehearsals during or previous to this engagement nor for any performances omitted, from whatever cause, during the season.

The Show shall hold back one week's payment of the Artist as a guarantee of good faith.

4. Upon the termination of this agreement from any cause, no claim shall be made by the Artist for the use of his or any name, lithograph, poster or other printed matter used thereafter.

5. Animals or pets not used in performances will not be allowed or carried unless by special permit of the Show; and then only upon payment of ten dollars a week for each animal or pet so carried.

6. The Artist shall at all times and places produce and present his act to the entire satisfaction of the Show.

7. The Artist's engagement with the Show is exclusive, and his act and presentation are represented as special, unique and extraordinary. During the contract period the Artist Is Prohibited from engaging or appearing with any other circus or wild west Show in the United States. For any violation of this clause, the Artist agrees that injunction or other adequate remedy restraining the Artist from performing for any other circus or wild west show before the completion of this contract, may issue out of any court of competent jurisdiction and the Show shall be entitled as liquidated damages, to a sum equal to double the amount of the Artist's compensation for the unexpired [5] period of contract.

It is expressly agreed and understood that if the show engages the Artist for the season of 1938—the Artist shall not perform in New York City between the closing of the Show of the season of 1937—and the beginning of the season of 1938—without the written consent of the Show.

8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the "act" by reason of the Artist's skill constitutes a "feature" performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same.

Independent Contractor.

9. The Artist under this contract is an Independent contractor, and seeks and accepts employment as such, anything herein contained to the contrary notwithstanding.

10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement of this contract, be determined.

11. The Artist Understands, Recognizes and Confirms that

(a) The Show Is transported by the railroad, not as common carrier, but by private arrangement and [6]

(b) That to affect transportation of its outfit the show releases the railroad for claim or liability for all damages to persons or property of whatever nature of both Artist and Show; and

(c) That the Artist in accepting from the Show meals, car-lodging and transportation on its circus train receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release of claim for damage of every nature and description that he may have during or after the period of performance, under this contract, against all transporting railroads and the show.

12. Now, Therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants and any transporting railroad company handling the Show's circus train movements, of and from claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during period of performance under this contract and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility

as an independent contractor which condition constitutes the essence of this contract.

The Artist declares that he has read—heard read the foregoing contract and understands the same.

In Witness Wherefo, the above named parties have hereunto set their hands and seals.

RINGLING BROS.-BARNUM & BAILY
COMBINED SHOWS, Inc.

By S. W. Gumpertz (Signed) (Seal)

In Presence of

.....

.....

Artist's Permanent Address:

226 50th Street, New York City

..... (Seal)

..... (Seal)

AMERICA OLVERA" (signed) Artist [7]

IV.

That thereafter to-wit and on the 20th day of February, 1937 the said defendants, Ringling Bros. Barnum & Baily combined Shows, Inc., ordered and directed plaintiff to render her services thereunder to defendant, Al G. Barnes Inc.

V.

That on or about the 20th day of March, 1937 plaintiff pursuant to the terms of said contract and the orders and directions of said defendants, Ringling Bros. Barnum & Baily Combined Shows Inc. commenced and did render her services as a balanced trapeze artist.

VI.

That the defendants and each of them during all times during the rendition of the services by the plaintiff, pursuant to the terms of said contract did provide, maintain and furnish the maintenance, set-up and erection of the equipment and apparatus used by plaintiff in the performance of her act as trapeze artist.

VII.

That on the 11th day of September, 1937, at about the hour of 3:45 p. m. at the City of Anthony, State of Kansas, the defendants and each of them set-up, erected and maintained the said apparatus of the plaintiff herein for the performance of the services as artist pursuant to the terms of the foregoing contract.

VIII.

That the said time and place defendants, their servants,
[RBC Purs. to order of Court 1-4-44]

grossly

agents and employees did \wedge negligently and carelessly erect, maintain and set-up the said equipment and apparatus so that as a direct and proximate result of gross [RBC 1-6-44 Purs. to Ord of Court] said \wedge negligence and carelessness of the defendants and each of them the plaintiff while rendering her services as such trapeze artist did fall from said trapeze and was seriously and severely injured in this to-wit:- fractured [8] and dislocated left arm and shoulder; fracture and dislocation of spine; bruises and contusions about the

head, arms, body and legs; and a shock to her nervous system.

IX.

[RBC Purs. to Ord of Court 1-6-44] gross

That as a direct and proximate result of the [^] negligence and carelessness of the defendants and each of them as aforesaid and as a direct and proximate result of the injuries sustained by plaintiff, plaintiff has been damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

X.

That plaintiff is informed and believes and therefore alleges that her injuries are permanent and that she will never fully recover therefrom.

XI.

That plaintiff is informed and believes and therefore alleges that she will be compelled to incur expenses in the care and treatment of said injuries as aforesaid in the approximate sum of Seven Hundred and Fifty (\$750.00) Dollars.

XII.

Plaintiff alleges that she has incurred in the care and treatment of said injuries as aforesaid the sum of Two Hundred and Fifty (\$250.00) Dollars.

XIII.

That the defendants John Doe One, Two, Three and Four, Jane Doe One, Two, Three and Four, Corporation

One, Two, Three and Four are sued herein by their fictitious names because their true names are unknown to plaintiff, but plaintiff will ask leave of Court to amend her complaint and insert same when ascertained.

Wherefore, plaintiff prays:—judgment in the sum of Fifty One Thousand (\$51,000.00) Dollars and for such other and further relief as to this Court may seem just and proper.

DAVID C. MARCUS

David C. Marcus

Attorney for plaintiff [9]

[Verified.]

Received copy of the within Amended Complaint for Personal Injuries this 1st day of December, 1938.

Arthur Garrett

Attorney for Defendant

[Endorsed]: Filed Dec. 1, 1938. [10]

[Title of District Court and Cause.]

MOTION OF AL G. BARNES AMUSEMENT
COMPANY, a corporation, TO DISMISS

This answering defendant moves to dismiss the Amended Complaint on file herein in that it fails to state a claim, or any claim, upon which relief can be granted against this answering defendant.

Dated this 5th day of December, 1938.

Arthur Garrett

ARTHUR GARRETT

By HAL HUGHES

Attorney for defendant Al G. Barnes Amusement
Company, a corporation.

756 South Broadway, Los Angeles, California

NOTICE OF MOTION

To David C. Marcus, Esq., Attorney for Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 482 Pacific Electric Building, Los Angeles, California, on to-wit, the 12th day of December, 1938, at the hour of 10:00 o'clock a. m. on that day, or as soon thereafter as counsel can be heard.

Dated this 5th day of December, 1938.

Arthur Garrett

ARTHUR GARRETT

By HAL HUGHES

Attorney for defendant Al G. Barnes Amusement
Company, a corporation.

756 South Broadway, Los Angeles, California

[Endorsed]: Filed Dec. 8, 1938. [11]

[Title of District Court and Cause.]

MEMORANDUM OF ORDER

Cosgrave, District Judge.

Although, under the contract the plaintiff assumes the duty of maintaining the equipment in first class condition, he pleads that the defendant actually did provide and maintain the set-up and erection of the equipment and apparatus and was negligent in this respect. Although not properly pleaded, nevertheless there seems to have been such a change as may amount to an executed oral agreement, and plaintiff should have a hearing.

The degree of negligence, and surrounding circumstances will determine whether or not the defendants are relieved under the terms of the contract.

The defendants' motion to dismiss is denied, answer to be filed within twenty days.

June 26, 1939.

Counsel notified by mail. RHM.

[Endorsed]: Filed Jun. 26, 1939. [12]

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Hereby Ordered that within eight (8) days from the date hereof defendant Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, may file herein a verified answer to plaintiff's amended complaint in lieu of the unverified answer filed today, with the same force and effect as if said verified answer had been filed today.

Dated: July 17th, 1939.

H. A. HOLLZER,
Judge.

Received copy of the within Order this 17th day of July, 1939.

David C. Marcus
Attorney for Plaintiff

[Endorsed]: Filed Jul. 18, 1939. [13]

[Title of District Court and Cause.]

ANSWER OF AL G. BARNES AMUSEMENT
COMPANY, A CORPORATION, SUED HERE-
IN AS AL G. BARNES INC., A CORPORA-
TION, TO AMENDED COMPLAINT

Comes now the Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, and answering the amended complaint on file herein, for itself and for no other defendant, admits, denies and alleges as follows:

I.

Answering Paragraph I of said amended complaint, admits that this defendant is a corporation operating and existing under the laws of one of the States of the United States, to-wit, the State of Indiana. Admits that this defendant has at all times mentioned in said paragraph been engaged in the business of operating a circus. Admits that during the months of March, 1937, and March, 1938, this defendant operated said circus in the County of Los Angeles, State of California. Denies generally and specifically every allegation in said paragraph contained which is not hereinabove expressly admitted.

II.

Answering Paragraph II of said amended complaint, this defendant denies each and every allegation contained

therein, except that it admits that, during all times mentioned in said amended complaint.

(a) The Board of Directors of this defendant consisted of: [14]

S. W. Gumpertz

Wm. Greve

F. T. Pender;

and its officers were as follows:

S. W. Gumpertz—Vice President

J. M. Kelley—Vice President

S. L. Cronin—2nd Vice President

F. T. Pender—Secretary and Treasurer

Theo. Forstall—Assistant Treasurer

Don H. Harter—Assistant Secretary;

(b) The Board of Directors of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. consisted of:

S. W. Gumpertz

J. M. Kelley

E. C. Ringling

A. B. Ringling

F. T. Pender

J. R. North

T. G. Caldwell;

and its officers were as follows:

S. W. Gumpertz—Senior Vice President

J. M. Kelley—Senior Vice President

E. C. Ringling—Vice President

A. B. Ringling—Vice President

F. T. Pender—Secretary and Treasurer

I. W. Robertson—Assistant Treasurer;

(c) The manager of the circus operated by this defendant was:

S. L. Cronin;

and the manager of the circus operated by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. was:

S. W. Gumpertz;

(d) The entire capital stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. was held in a voting trust of [15] which the voting trustees were:

Wm. Greve

S. W. Gumpertz

J. M. Kelley

F. T. Pender

John Ringling (died, December 1st, 1936);

(e) The entire capital stock of this defendant was owned and controlled by Circus Zoological Gardens, Inc., an Indiana corporation, all of whose capital stock in turn was held in a voting trust of which the voting trustees were:

Wm. Greve

S. W. Gumpertz

J. M. Kelley

F. T. Pender

John Ringling (died, December 2nd, 1936);

[WPD JR] ~~††~~

and this defendant denies that the beneficial interests in the two voting trusts referred to in subsections (d) and (e) above are identical.

III.

Answering Paragraph III of said amended complaint, this defendant admits the allegations thereof.

IV.

Answering Paragraph IV of the amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on that ground, denies generally and specifically each and every allegation in said paragraph contained.

V.

Answering Paragraph V of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on that ground, denies generally and specifically each and every allegation in said [16] paragraph contained, except that it admits that on or about the 20th day of March, 1937, plaintiff commenced and did render her services as a balanced trapeze artist.

VI.

Answering Paragraph VI of said amended complaint, this defendant denies generally and specifically each and every allegation in said paragraph contained.

VII.

Answering Paragraph VII of said amended complaint, this defendant denies generally and specifically each and every allegation in said paragraph contained.

VIII.

Answering Paragraph VIII of said amended complaint with respect to the injuries set forth in said paragraph,

this defendant is without sufficient information or belief on the subject to enable it to answer, and basing its denials upon said ground, denies that said injuries, or any of them, were received by plaintiff.

This defendant admits that plaintiff fell and was injured.

This defendant admits that said fall and injury occurred at Anthony, Kansas. This defendant denies that said fall occurred on September 11th, 1937, and on the contrary alleges that said fall occurred on September 12th, 1937.

This defendant denies each and every allegation in said paragraph contained not hereinabove specifically admitted or denied for want of information or belief.

IX.

Answering Paragraph IX of said amended complaint, this defendant denies that it was ever negligent or careless at all. With respect to the claim of damages in said paragraph contained, this defendant denies that plaintiff has been damaged at all through any fault of this defendant, or that plaintiff has been damaged in [17] the sum of Fifty thousand dollars (\$50,000.00), or any other sum, or at all.

X.

Answering Paragraph X of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer, and basing its denials on said ground, denies generally and specifically each and every allegation therein contained.

XI.

Answering Paragraph XI of said amended complaint, this defendant is without information or belief on the subject sufficient to enable it to answer the allegations therein contained, or any of them, and basing its denials upon said ground, denies each any every allegation therein contained.

XII.

Answering Paragraph XII of said amended complaint, this defendant is without information or belief on the subject to enable it to answer the allegations therein contained, and basing its denials upon said ground, denies each and every allegation in said paragraph contained.

And for a Further, Second and Separate Defense to the Amended Complaint on File Herein, Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of its first defense herein and makes the same a part hereof the same as if hereat set out at length.

II.

Alleges that the amended complaint fails to state a claim against defendant upon which relief can be granted.

And for a Further, Third, Separate and Distinct Defense to the Amended Complaint on File Herein, This Defendant Admits, De- [18] nies and alleges as follows:

I.

Realleges Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That at the time and place of the occurrence of the injury to plaintiff alleged in her amended complaint, plaintiff was employed by this defendant and that said injury, if any, to plaintiff arose out of, and occurred in the course of, her said employment by this defendant. That the contract of employment whereunder plaintiff was so employed by this defendant was made in the State of California; that at the time of the injury alleged plaintiff was a resident of the State of California; that under and by virtue of the laws of the State of California, and in particular the California Workmen's Compensation Insurance and Safety Act of 1917, and the Acts Amendatory thereto, and in particular Sections 55-a and 58 thereof (California Labor Code Sections 5300, 5301, and 5305), the Industrial Accident Commission of the State of California, is given sole and exclusive jurisdiction of the claim asserted by plaintiff herein; that this Court has no jurisdiction herein.

And for a Fourth, Separate and Distinct Defense to the Amended Complaint Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That the accident described by plaintiff's amended complaint, and the injuries or damages, if any, alleged to have been sustained by plaintiff by reason thereof, were

solely and proximately [19] and exclusively sustained by plaintiff, if at all, by reason of an unavoidable and inevitable accident, so far as this defendant is concerned.

And for a Further, Separate and Fifth Defense to the Amended Complaint on File Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats the allegations of Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, the same as if hereat set out at length.

II.

That the accident referred to in said amended complaint, and the injuries and damages alleged to have been sustained by plaintiff, if any, were solely and directly and proximately caused by the negligence of the plaintiff.

And for a Further, Separate and Sixth Defense to the Amended Complaint on File Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Realleges Paragraphs I to XII inclusive of the First defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

Alleges that the accident referred to in the said amended complaint and the injuries and damages alleged to have been sustained by plaintiff, if any, were directly and proximately caused by the negligence of the plaintiff, thereunto contributing.

And for a Further, Separate and Seventh Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first [20] defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That plaintiff has heretofore released and discharged this defendant from the claim and cause of action sued upon herein.

And for a Further, Separate and Eighth Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That at the time and place of the accident sued on herein plaintiff, as employee, was engaged in the performance of services for this defendant, as employer, and that by agreement with this defendant plaintiff had assumed for herself exclusively all risks incident to such employment, including risk of the accident sued on herein and said accident, and had released and discharged this defendant of and from all claims, demands, causes

of action, damages, liabilities, or things whatsoever, growing out of any injury or accident to plaintiff while performing said services.

And for a Further Separate and Ninth Defense Herein, This Defendant Admits, Denies and Alleges as Follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof as if hereat set out at length.

II.

That at the time and place of the accident sued on herein plaintiff, as independent contractor, was engaged in the performance of services for this defendant, as principal, and that by agreement with this defendant plaintiff had assumed for herself exclusively [21] all risks incident to such services, including risk of the accident sued on herein and said accident, and had released and discharged this defendant of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services.

Wherefore, this defendant prays that plaintiff take nothing by this action, and that this defendant go hence with its costs.

ARTHUR GARRETT

Attorney for defendant Al G. Barnes Amusement
Company, sued herein as Al G. Barnes Inc.,
a corporation [22]

[Verified.]

[Endorsed]: Filed Jul. 24, 1939. [23]

[Title of District Court and Cause.]

SEPARATE ANSWER OF RINGLING BROS.-
BARNUM & BAILY COMBINED SHOWS,
INC.

Comes now defendant Ringling Bros.-Barnum & Baily Combined Shows, Inc., a corporation, and answering plaintiff's Amended Complaint on file herein admits, denies and alleges as follows:

I.

Answering Paragraph I thereof, this answering defendant admits that it is a corporation operating and existing under and by virtue of the laws of one of the states of the United States, to-wit, the State of Delaware; admits that defendant Al G. Barnes Amusement Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, to-wit, the State of Indiana; admits that this answering defendant and defendant Al G. Barnes Amusement Company have been and were during the times referred to in plaintiff's Amended Complaint, operating circuses and that each of said defendants has operated a circus in the County of Los Angeles, State of California but in this connection alleges that at the time of the accident complained of in plaintiff's amended complaint this answering defendant was not operating a circus in the County of Los Angeles, State of California, but was operating a circus in the State of Oklahoma; alleges that this answering defendant has no information or knowledge sufficient to form a belief as to the truth of the [24] remaining allegations in said amended complaint, and basing its denial on said lack of

knowledge and information denies each and several all the remaining allegations in said Paragraph I contained.

II.

Answering Paragraph II thereof, this answering defendant refers to Paragraph III of the Answer of Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, to plaintiff's Amended Complaint on file herein, and by this reference makes each and several the allegations commencing with line 30, page 1, and running to and including line 18, page 3 thereof, a part of this its answer to Paragraph II of plaintiff's Amended Complaint on file herein, incorporates the same herein, and each and several the admissions and denials therein contained, and makes them a part hereof and makes them its answer to Paragraph II of plaintiff's amended complaint on file herein; denies each and several all the remaining allegations in said Paragraph II contained.

III.

Answering Paragraph IV thereof, this answering defendant denies each and several all the allegations therein contained.

IV.

Answering Paragraph V thereof, this answering defendant admits that on or about the 20th day of March, 1937, plaintiff commenced to and did render her services as a balanced trapeze artist to Al G. Barnes Amusement Company; denies each and several all the remaining allegations in said Paragraph V contained.

V.

Answering Paragraph VI thereof, this answering defendant denies each and several the allegations therein contained.

VI.

Answering Paragraph VII thereof, this answering defendant denies each and several the allegations therein contained. [25]

VII.

Answering Paragraph VIII thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations respecting the injuries set forth in said paragraph, and basing its denial upon said lack of knowledge or information denies that said injuries as related by plaintiff in said paragraph, were received; admits that plaintiff fell and was injured; admits that said fall and injury occurred at Anthony, Kansas; alleges that said fall occurred on September 12, 1937; denies generally and specifically each and several all the remaining allegations in Paragraph VIII contained, not otherwise herein specifically admitted.

VIII.

Answering Paragraph IX thereof, this answering defendant denies generally and specifically each and several all the allegations therein contained.

IX.

Answering Paragraph X thereof, this answering defendant alleges that it is without knowledge or informa-

tion sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained. [26]

X.

Answering Paragraph XI thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained.

XI.

Answering Paragraph XII thereof, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and basing its denial on said lack of information or knowledge denies each and several the allegations therein contained.

XII.

Denies generally and specifically that because of any act, omission, recklessness, carelessness or negligence on the part of this answering defendant, the accident referred to in the amended complaint on file herein occurred, or that plaintiff has been damaged in the sum of \$50,000.00 or in any other sum or sums whatsoever, or at all.

For a Separate, Affirmative and Distinct Defense This Answering Defendant Alleges as Follows:

I.

That the injury to plaintiff specified in the Amended Complaint on file herein was due to and proximately caused by the carelessness and negligence of plaintiff, and this answering defendant further alleges that all risks and dangers of the employment in which plaintiff was engaged and of her place and work, were at the time of the injury to plaintiff on said 12th day of September, 1937, and at all times for many months immediately preceding and prior thereto, had been seen by and fully known to plaintiff, and understood and appreciated by her, and that all said risks and dangers were [27] assumed by plaintiff during all said time; that the nature, extent and construction of the trapeze and trapeze equipment operated and performed upon by plaintiff, and owned by her, as well as the other equipment belonging to the defendant Al G. Barnes Amusement Company, used in the performance of the act and trapeze performance by plaintiff herein at the time and place of the injury to her referred to in plaintiff's amended complaint herein, and the risks and dangers incident thereto, were open, obvious and apparent and fully understood by and known to plaintiff at all times during her said employment prior to said accident, and that plaintiff carelessly and negligently fell from said trapeze in the performance of her act; that said plaintiff knew all the risks and dangers of said employment; that at the time of the fall which resulted in the injury occurring on September 12, 1937, and for many years prior thereto, said plaintiff was of good and sound general mentality and mental condition, had full

and complete knowledge of the business and occupation in which she was engaged, to-wit, that of trapeze performer and artist, and had had many years of experience extending from her childhood up to the time of her accident; that at the time of the accident which took place on September 12, 1937, plaintiff was of mature age, to-wit, of about the age of 28 years, and had been engaged for more than 20 years prior thereto in the occupation and business of trapeze performer and artist.

For a Second, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That any injuries which plaintiff may have sustained at the time and place referred to in plaintiff's amended complaint, were proximately caused by her own carelessness and negligence or by the negligence or carelessness of her fellow workmen and in no way by negligence on the part of this answering defendant; that [28] none of said fellow servants directly or indirectly represented this answering defendant but that they did represent and act for and on behalf of plaintiff; that none of said fellow workmen acted in a capacity superior to plaintiff; that all of said fellow workmen were employees chosen by the same employer as plaintiff was employed by, to-wit, Al G. Barnes Amusement Company, and chosen by it with due care, and were engaged in accomplishing and promoting the same general purposes and ends as this plaintiff was engaged in accomplishing and promoting at the time and place of said accident, and that all of said fellow workmen were skilled in the occupation in which they were engaged.

For a Third, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That plaintiff herself did not exercise ordinary care, caution or prudence in the premises to avoid the accident referred to in plaintiff's amended complaint and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff in the premises.

For a Fourth, Separate and District Defense This Answering Defendant Alleges:

I.

That at the time of the alleged accident and injury to plaintiff, she was in the service and an employee of the defendant, Al G. Barnes Amusement Company, as a trapeze performer and artist, in a circus act owned and operated by the defendant Al G. Barnes Amusement Company; that there was then and there in said circus diverse other employees of the defendant Al G. Barnes Amusement Company, in like manner engaged and employed by and acting for the defendant Al G. Barnes Amusement Company, in promoting the same [29] general purposes and ends as plaintiff was accomplishing and promoting, and were assisting plaintiff in her performance, to-wit, rigging-man or rope holder, and husband of plaintiff, and eight net holders; that all of said employees were then and there fellow servants with the plaintiff in one and the same line of employment; that in the selection and employment of said co-employees the defendant Al G. Barnes Amusement Company exercised due and reasonable care and the said co-employees were competent, skillful and

prudent persons in their respective positions, and that none of said co-employees acted in a capacity superior to plaintiff, and that none of said co-employees, directly or indirectly, represented this answering defendant or the defendant Al G. Barnes Amusement Company in any capacity other than assistant to the plaintiff in the performance of her act; that if there was any negligence or carelessness other than that of plaintiff, by means of which said accident and injury happened to plaintiff, it was the negligence or carelessness of said co-employees, or one or some of them, and not of this answering defendant or the defendant Al G. Barnes Amusement Company, or any other person.

For a Fifth, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That at the time and place of the alleged injury to plaintiff, plaintiff was employed by the defendant Al G. Barnes Amusement Company as an independent contractor, in the performance of a circus act known as a trapeze act, and as such independent contractor it was the express duty of plaintiff, under and by the terms of her contract, said contract being on file herein as Paragraph III of plaintiff's amended complaint and by this reference thereby made a part of this affirmative defense, to furnish, inspect and look after all the defects, if any, in the paraphernalia, appliances and equipment used in her

act or performance, and the plaintiff assumed exclusive supervision regarding inspection of the act and [30] premises, and plaintiff had full right and authority, and it was her express duty, to remedy, repair any and all defects in said appliances and equipment, if any existed during her said employment, and to keep the same in a safe and suitable condition.

II.

That the injury to plaintiff was not caused by any act, error, omission, carelessness or negligence of this answering defendant or the defendant Al G. Barnes Amusement Company, but was caused solely by the carelessness and lack of diligence of plaintiff in not furnishing proper and safe appliances, paraphanelia and equipment, and not keeping the same in a good, suitable and safe condition, which said carelessness and negligence on the part of plaintiff was the proximate cause of her injury.

For a Sixth, Separate and Distinct Defense This Answering Defendant Alleges:

I.

That at the time and place of the accident sued on herein, plaintiff as an employee of the Al G. Barnes Amusement Company, was engaged in the performance of services for said Al G. Barnes Amusement Company, as employer, and that by agreement with said Al G. Barnes Amusement Company had assumed for herself exclusively all risks incident to such employment, includ-

ing the risk of the accident sued on herein, and said agreement released and discharged all of the defendants in this action of any of the claims, demands, causes of actions, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services for defendant Al G. Barnes Amusement Company, or for any other person or individual under and by virtue of the terms of the contract set forth in the Amended Complaint herein, or otherwise or at all. [31]

Wherefore, this answering defendant prays that plaintiff take nothing by way of her amended complaint on file herein, for costs of suit incurred herein, and for such further relief as to the Court may seem just and equitable.

COMBS & MURPHINE

By LEE COMBS

Attorneys for defendant Ringling Bros.-Barnum & Baily
Combined Shows, Inc. [32]

[Verified.]

[Endorsed]: Filed Oct. 9, 1939. [33]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF AL G. BARNES
AMUSEMENT COMPANY, A CORPORATION,
SUED HEREIN AS AL G. BARNES, INC., A
CORPORATION.

Comes now defendant Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes, Inc., a corporation, and amends its answer on file herein by adding the following:

And for a Further, Separate and Eighth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That the injury to plaintiff specified in the amended complaint on file herein was due to and proximately caused by the carelessness and negligence of plaintiff, and this answering defendant further alleges that all risks and dangers of the employment in which plaintiff was engaged, and of her place and work, were at the time of the injury to plaintiff on said 12th day of September, 1937, and at all times for many months immediately preceding and prior thereto had been, seen by and fully known to plaintiff, and understood and appreciated by her, and that all said risks and dangers were assumed by plaintiff during all said time; that the nature, [34] extent and construction of the trapeze and trapeze equipment operated and performed upon by plaintiff, and owned by her, as

well as the other equipment belonging to the defendant Al G Barnes Amusement Company used in the performance of the act and trapeze performance by plaintiff herein, at the time and place of the injury to her referred to in plaintiff's amended complaint herein, and the risks and dangers incident thereto, were open, obvious and apparent and fully understood by and known to plaintiff at all times during her said employment prior to said accident, and that plaintiff carelessly and negligently fell from said trapeze in the performance of her act; that said plaintiff knew all the risks and dangers of said employment; that at the time of the fall which resulted in the injury occurring on September 12th, 1937, and for many years prior thereto, said plaintiff was of good and sound general mentality and mental condition, had full and complete knowledge of the business and occupation in which she was engaged, to-wit, that of trapeze performer and artist, and had had many years of experience in trapeze performances extending from her childhood up to the time of her accident; that at the time of the accident which took place on September 12th, 1937, plaintiff was of mature age, to-wit, of about the age of twenty-eight years, and had been engaged for more than twenty years prior thereto in the occupation and business of trapeze performer and artist.

And for a further, Separate and Ninth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That any injuries which plaintiff may have sustained at [35] the time and place referred to in plaintiff's amended complaint, were proximately caused by her own carelessness and negligence, or by the negligence or carelessness of her fellow workmen, and in no way by negligence on the part of this answering defendant. That all of said fellow servants acted for and represented plaintiff; that none of said fellow workmen acted in a capacity superior to plaintiff; that all of said fellow workmen were employees chosen by the same employer as plaintiff was employed by, to-wit, this answering defendant, and chosen by it with due care, and were engaged in accomplishing and promoting the same general purposes and ends as this plaintiff was engaged in accomplishing and promoting at the time and place of said accident, and that all of said fellow workmen were skilled in the occupation in which they were engaged.

And for a Further, Separate and Tenth Defense Herein, this defendant admits, denies and alleges as follows:

I.

Repeats Paragraphs I to XII inclusive of the first defense herein, and Paragraph II of the second defense herein, and makes the same a part hereof the same as if hereat set out at length.

II.

That at the time of the alleged accident and injury to plaintiff, she was in the service of, and an employee of, this answering defendant, as a trapeze performer and artist, in a circus act owned and operated by this answer-

ing defendant; that there were then and there in said circus act divers other employees of this answering defendant, in like manner engaged and employed by and acting for this answering defendant in promoting the same general purposes and ends as plaintiff was accomplishing and promoting, and were assisting plaintiff in her performance, to-wit, rigging man or rope holder, and husband of plaintiff, and eight net holders; that all of said employees were then and there fellow [36] servants with the plaintiff in one and the same line of employment; that in the selection and employment of said co-employees, this answering defendant exercised due and reasonable care, and the said co-employees were competent, skillful and prudent persons in their respective positions, that none of said co-employees acted in a capacity superior to plaintiff, that none of said co-employees directly or indirectly represented this answering defendant in any capacity other than assistant to the plaintiff in the performance of her act; that if there was any negligence or carelessness other than that of plaintiff by means of which said accident and injury happened to plaintiff, it was the negligence or carelessness of said co-employees, or one or some of them, and not of this answering defendant, or any other person.

Arthur Garrett

ARTHUR GARRETT

Attorney for Defendant Al G. Barnes Amusement
Company, a corporation, sued herein as Al G.
Barnes, Inc., a corporation.

[Endorsed]: Filed Jan. 18, 1940. [37]

[Title of District Court and Cause.]

AMENDMENT TO
~~AMENDED~~ ANSWER OF DEFENDANTS

Come now defendants and answering the amendment and amendment by interlineation of plaintiff's amended complaint herein, in addition to their answer heretofore made to said complaint which same is incorporated herein, and reallege each and several the allegations therein made as if set forth verbatim herein; allege that the claim of plaintiff herein is barred by the terms, conditions and provisions of the statute of limitations, being particularly the provisions of Part 2, Title 2, Chapter III of the Code of Civil Procedure of the State of California and in particular the terms and provisions of Section 340 C. C. P.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants [38]

[Verified.]

[Endorsed]: Filed Jan. 6, 1944. [39]

[Title of District Court and Cause.]

ORDER

Under Rule 16 of Rules of Civil Procedure

This cause coming on under the Order of the Court heretofore issued directing the Attorneys to appear at Chambers, pursuant to Rule 16 of the Rules of Civil Procedure for conference; appeared David Marcus, attorney for the plaintiff and the plaintiff in her own proper person; and Arthur Garrett, attorney for the defendant Al G. Barnes Amusement Company, a Corporation. It was thereupon ordered that pursuant to said Rule the conference proceed. After discussing the pleadings and issues, it was stipulated by the plaintiff and the defendant that the contract of Sept. 24, 1936, in suit, was entered into by the said parties in the State of Florida; and that the accident in issue occurred in the State of Kansas; that the signature to the letter dated Feby. 25, 1937, at Sarisota, Florida, on the letter head of Ringling Bros.-Barnum & Bailey, Combined Shows, Inc., directed to Miss America Olvera, is the signature of Pat Valdo; that plaintiff is also known as America Olvera Pollinger. The attorney for defendant for lack of information was unable to further stipulate until facts are ascertained from his clients in New York.

After further conference it was ordered that plaintiff amend her complaint incorporating therein the contract of Sept. 24, 1936, declared on, in haec verba, within five

days, and that defendant answer under oath within twenty days by specific, direct and positive answers, not on information and belief, each and all allegations [40] with reference to the corporate relation of the defendant Al G. Barnes Amusement Company, a corporation, to Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

It was further ordered that further conferences be postponed until the attorney for the defendant is further advised, and until after filing of the defendant's answer to the amended complaint; and that the case be placed on the assignment calendar for Nov. 28, 1938, for fixing a time of trial.

This order is entered pursuant to and in compliance with Rule 16 of the Pre-Trial Procedure of the Rules of Civil Procedure for District Courts of the United States, and will control the subsequent course of this action.

Dated this 3rd day of November, 1938.

JEREMIAH NETERER
U. S. District Judge.

[Endorsed]: Filed Nov. 4, 1938. [41]

[Title of District Court and Cause.]

MOTION FOR DIRECTED VERDICT

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to direct a verdict in favor of defendants and against plaintiff herein on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants *of* any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or waiver from the release clause contained in plaintiff's contract, plaintiff's Exhibit No. 1 in this action, and that the same is of [42] binding force and effect upon the plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having oc-

curred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony; Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment.

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al. G. Barnes Show, together with the fact that plaintiff was an independent contractor, does not relieve her from the law of Kansas providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants. [43]

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge

of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection:

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) No gross negligence and no wanton or willful misconduct has been proven and the contract relieves defendants of any liability.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should direct a verdict in favor of defendants in this action.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants

[Endorsed]: Filed Jan. 11, 1944. [44]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 11th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B

America Olvera, etc.,

Plaintiff,

v.

Al G. Barnes Amusement Company, a corporation, and
Ringling Bros.-Barnum & Bailey Combined Shows,
Inc.,

Defendants.

This cause coming on for further trial.

xx xx xx

Attorney Combs files motion for directed verdict in favor of defendants, states the grounds thereof, and argues. Attorney Marcus argues in opposition. The motion is denied. [45]

[Title of District Court and Cause.]

JURY INSTRUCTIONS

Court's Instruction No. A

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

Given by the court of its own motion.

Beaumont,
J.

G. [46]

Plaintiff's Instruction No. 1

The care to be exercised in a given situation is dependent upon the danger and hazard sought to be avoided. If the danger involved in an undertaking is great, then the care and caution required in its operation is correspondingly great; for under the law as given by these instructions the amount of care and caution must vary in accordance with the nature of the act and surrounding circumstances, and such care and caution increase as does the danger reasonably to be apprehended.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R.

Covered [47]

Plaintiff's Instruction No. 2

To establish the defense of contributory negligence the burden is upon the defendants to prove by a preponderance of evidence that the plaintiff was negligent and also that such negligence contributed in some degree so that it was a *proximate* cause of the injury.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R. [48]

Plaintiff's Instruction No. 3

Negligence is the doing of some act which a reasonable and prudent person would not do, or the failure to do something which a reasonable and prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

Objected to

R. [49]

Plaintiff's Instruction No. 4

Any evidence that has been received of an act or omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of oral admission of a party other than his own testimony in the trial ought to be viewed by you with caution.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

#3
objection G [50]

Plaintiff's Instruction No. 5

A witness false in one part of his testimony is to be distrusted in others, that is to say you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point unless from all the evidence you believe that the probability of truth favors his testimony in other particulars.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [51]

Plaintiff's Instruction No. 6

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witness and after weighing the various factors of the evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

Given ✓

Refused

C. E. Beaumont,
Judge

G [52]

Plaintiff's Instruction No. 7

Your verdict must be based solely on the evidence received and the law as given you in these instructions, and not upon anything you may have otherwise heard or read. The instructions are to be considered as a whole.

Given ✓

Refused

C. E. Beaumont,
Judge

G [53]

Court's Instruction No. B

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation concerning the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it.

~~You are to decide this case solely upon the evidence that has been admitted by the court herein, considered in the light of the instructions of the court. The instructions are to be considered as a whole.~~

Given by the court of its own motion.

G. [54]

Plaintiff's Instruction No. 8

You are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses. Your power of judging however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of legal evidence. You are not bound to believe the testimony of any witness unless ^{such} testimony imparts verity and establishes conviction in your minds. Nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or against other evidence satisfying your minds.

Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness, or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth.

Given as modified

Refused.....

C. E. Beaumont,
Judge

G [55]

Plaintiff's Instruction No. 9

The term "preponderance of the evidence" means that the evidence on one side is of greater weight than the evidence produced on the opposite side; it does not mean necessarily that a preponderance is produced by a greater number of witnesses—it is the greater weight of the credible evidence as it may appear to the minds of the jury.

Given✓.....

Refused.....

C. E. Beaumont,
Judge

G [56]

Court's Instruction C

The burden is upon a plaintiff alleging gross negligence to prove such negligence by a preponderance of the evidence, and that such gross negligence was the proximate cause of injury to the plaintiff. To establish the defense of contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury. Contributory negligence may be inferred from the whole evidence, or a part thereof, without regard to which party or parties introduced such evidence.

Given by court of own motion.

Beaumont,

J. [57]

Plaintiff's Instruction No. 10

A plaintiff who brings an action has the duty, before he can be permitted to recover, to establish all of the material allegations of his complaint by a preponderance of the evidence. A defendant who pleads contributory negligence of a plaintiff by way of defense has the burden such

of proving ~~that~~ negligence by a preponderance of the evidence. ~~Contributory negligence may be inferred, however, from all or any of the evidence in the case whether presented by plaintiff or defendant.~~

Given.....

Refused✓.....

C. E. Beaumont,

Judge

G. as m.

Copy 116-A. [58]

Plaintiff's Instruction No. 11

A principal is responsible for the acts of his agents and employees performed within the scope of their employment. You are instructed that the contract in evidence between plaintiff and defendants Ringling Brothers, among other things provides "the show by agreement reserves the right to transfer and place the artist during the term or part term of this contract with any other of its shows or circuses under its ownership or management all terms and conditions of this contract continuing, prevailing and obtaining—" and you further find that defendant Ringling Brothers did transfer and place the artist with the Al G. Barnes Amusement Company who was then under the management or ownership of defendant Ringling Brothers, then if you find plaintiff is entitled to recover your judgment must be against both defendants Ringling Brothers and Barnes Amusement Company.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

Withdrawn [59]

Plaintiff's Instruction No. 12

If you find from a preponderance of the evidence that
their
defendants, ~~its~~ servants, agents and employees were grossly negligent in the erection and maintenance of plaintiff's rigging or were grossly negligent in the maintenance and operation of the net in question which proxi-

matley caused or contributed to plaintiff's injuries then I charge you your verdict must be in favor of plaintiff and against the defendants, Ringling Brothers, Barnum and Bailey Combined Shows and Al G. Barnes Amusement Company.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

R. [60]

Plaintiff's Instruction No. 13

You are instructed that gross negligence has been defined as the want or absence of or failure to exercise slight care or diligence. The term implies a Thoughtless disregard of consequences, it is a relative term, which is to be understood as meaning a greater want of care than is implied by the term ordinary negligence; but the circumstances of each particular case are to be taken into consideration, and what might be merely ordinary negligence under one set of circumstances or conditions might constitute gross negligence under other conditions or circumstances.

(45 Corpus Juris, 668)

Given.....

Refused✓.....

C. E. Beaumont,
Judge

To present
authority [61]

Plaintiff's Instruction No. 14

If you find that plaintiff's apparatus at the time and place in question was set up by the defendant Al G. Barnes Amusement Company, its servants and employees, in a grossly negligent and careless manner, or that the safety net was operated and maintained in a grossly careless and negligent manner, and that the injuries of plaintiff were solely and proximately caused as a result of such carelessness and negligence on the part of the said defendant, its servants and employees, then I charge you that your verdict must be in favor of plaintiff and against the defendant Al G. Barnes Amusement Company. If you further find that the said defendant Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, you must also return your verdict for the plaintiff and against said defendant Ringling Bros.-Barnum & Bailey Combined Shows.

Given.....

Refused✓.....

C. E. Beaumont,
Judge

May be withdrawn [62]

Plaintiff's Instruction No. 14-A

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which

she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which [63] proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the manage-

ment and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows.

Given at plaintiff's request.

Beaumont,

J. [64]

Plaintiff's Instruction No. 15

If you find that plaintiff's apparatus at the time and place in question was erected, set up and maintained by the defendants, *it* servants, agents and employees, in a grossly negligent and careless manner, or that the safety net was operated and maintained by defendants in a grossly careless and negligent manner, and that the injuries of plaintiff were proximately caused as a result of such carelessness and negligence on the part of said defendants, then I charge you that your verdict must be in favor of plaintiff and against defendants.

Given.....

Refused✓.....

C. E. Beaumont,

Judge

Same as 14 [65]

Plaintiff's Instruction No. 16

If after considering the evidence you find the plaintiff is entitled to recover, you will consider in fixing the amount of the award the elements of damage that I now am about to mention; the reasonable value of plaintiff's time lost, if any, since her injury wherein she has been unable to pursue her occupation. In determining this amount you should consider evidence of plaintiff's earnings and the manner in which she ordinarily occupied her time before the injury, find what she was reasonably certain to have earned in the time lost had she not been disabled; you will also consider not only the element of damage heretofore mentioned but also such sum as will reasonably compensate plaintiff for the pain, discomfort and anxiety, if any, ~~as~~ she has suffered by her and proximately resulting from the injury in question; and for such pain, discomfort and anxiety, if any, as she is ~~reasonably~~ certain to suffer in the future from the same cause. Also the sum as will reasonably compensate plaintiff from any loss of earning power occasioned her by the injury in question and from which she is ~~reasonably~~ certain to suffer in the future. In fixing this amount you will consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of her injuries, whether or not they are reasonably certain to be permanent or if not permanent, the extent of their duration all to the end of determining the effect of her injuries

upon her by the earning capacity and the present value of the loss so suffered. Damages, if given, must be reasonable and your award, if any, must be based on a preponderance of the evidence. Such damages, if any, may not exceed the sum prayed for in the amended complaint.

Given.....

Refused.....

C. E. Beaumont,
Judge

G. as M. [66]

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED INSTRUCTIONS

Come now the defendants, and submit the following instructions: [67]

Defendant's Instruction No. 1

You are instructed to return a verdict in favor of the defendants.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

R [68]

Defendant's Instruction No. 2

If the jury find from the evidence that the plaintiff herself was careless or negligent at the time and place proximately of the accident, and that such negligence ~~directly~~ contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Smith vs. Beasley, 92 Kans. 390; 140 Pac. 892

Udey vs. City of Winfield, 155 Pac. 43 (Kans.)

No objection G [69]

Defendant's Instruction No. 3

I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Riverside Iron Works vs. Green, 79 Kans. 588;
100 Pac. 482

Morbach vs. Home Mining Co., 53 Kans. 731;
37 Pac. 122

Brown vs. Board of Trustees, 41 Cal. App. 100;
182 Pac. 316

Tartar vs. Mo. K. & T. Co., 241 Pac. 246 (Kans.)

Objected to R [70]

Defendant's Instruction No. 4

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior
that
to the use of same at the time of her accident and \wedge there was a defect in said apparatus which was the proximate

fall if you find that cause of her ~~injury~~, and [^] plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

Given

Given as modified

Not given

C. E. Beaumont

Judge

Fritchman vs. Chetwood Battery Co., 8 Pac. (2)
368 (Kans.)

Barnes v. Akins, 166 Pac. 474 (Kans.) [71]

Defendant's Instruction No. 5

I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has knowledge and the independent contractor has neither actual nor constructive knowledge. ~~and if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was within the knowledge of defendants, and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants.~~

~~Given~~

Given as modified

~~Not given~~

C. E. Beaumont

Judge

G as M

Riverside Iron Works vs. Green, 79 Kans. 588;
100 Pac. 482

Morbach vs. Home Mining Co., 53 Kans. 731;
37 Pac. 122

Brown vs. Board of Trustees, 41 Cal. App. 100;
182 Pac. 316

Objected to. [72]

Defendant's Instruction No. 6

If you find that the plaintiff, America Olvera, contracted by written contract to furnish a "specialty act" in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Brosius vs. Orpheum Theatre, 16 Cal. App. (2)

61

R [73]

Defendant's Instruction No. 7

You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, America Olvera, was performing duties assumed by her under her written contract with the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and no other; that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of "independent contractor" on the part of plaintiff, and "contractee" on the part of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

~~Given~~

~~Given as modified~~

~~Not given~~✓

C. E. Beaumont

Judge

Batt vs. San Diego Sun Pub. Co. Ltd., 21 Cal.
App. (2) 429; 69 Pac. (2) 216

Pearson vs. Potter Company, 10 Cal. App. 245;
216 Pac. 578

No objection. G. [74]

Defendant's Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the

carrying out of her performance, then you shall find in favor of defendants.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Same as 17. R. Covered. [75]

Defendant's Instruction No. 9

You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Goodwin vs. Goodwin, 5 Cal. App. (2), p. 646,
citing Krause vs. Rarity, 210 Cal. 644, at 655

G. [76]

Defendant's Instruction No. 9a

The elemental idea of "negligence" is failure or omission—the failure or omission to do something which should have been done. Negligence that is "gross" involves the additional and affirmative element of intent to do or willfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Seelig vs. First Nat. Bank, D. C. Ill., 20 F. Supp.
61, 68

R. [77]

Defendant's Instruction No. 10

The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the court will further instruct as to the

application of the law of Kansas on the question of negligence and other issues presented.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont
Judge

Restatement of the Law

Conflict of Laws, Secs. 385-386

Loranger vs. Nadeau, 215 Cal. 362; 10 Pac. (2)
63

Keane Wonder Mining Co. vs. Cunningham, 138
C. C. A. 247; 222 Fed. 821

Erie Railroad Co. vs. Tompkins, 304 U. S. 64;
82 Law Ed. 1188; 114 A. L. R. 1487

R. Not necessary. [78]

Defendant's Instruction No. 11

You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence towards her, you must find for the defendants in this action.

~~Given~~

~~Given as modified~~

~~Not given~~

C. E. Beaumont
Judge

G. [79]

Defendant's Instruction No. 17

In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover
danger and
if her injuries were caused by such \wedge peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Parker vs. Witchita, 92 Pac. (2) 86; 150 Kan.
249

Fritchman vs. Chetwood Battery Co., 8 Pac. (2)
368 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584

Corrected instruction 14. G. [80]

Defendant's Instruction No. 19

The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be based upon sympathy for or prejudice against any party.

Given

Given as modified

Not given

C. E. Beaumont

Judge

Star Brewing Co. vs. Houck, 222 Ill. 348; 78 N. E.
827

G. as M. [81]

Defendant's Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work,

and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants.

Given

Given as modified

Not given

C. E. Beaumont

Judge

Morbach vs. Home Mining Co., 37 Pac. 122
(Kans.)

Walker v. Scott, 67 Kans. 814; 64 Pac. 615

Cheek vs. Eyeth, 89 Pac. (2) 11 (Kans.)

R. What evidence to support? Ignores net. [82]

Defendant's Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full

knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect.

Given

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Morbach vs. Home Mining Co., 37 Pac. 122
(Kans.)

R [83]

Defendant's Instruction No. 22

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one

factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Given

Given as modified

Not given

C. E. Beaumont

Judge

California Jury Instructions (Civil) 61 and 61-a
as adopted for use in the Superior Court of Los
Angeles County, California

G [84]

Defendant's Instruction No. 23

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Both negli-

gence and proximate cause, as defined in these instructions, are requisites for founding liability.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instructions (Civil) 63 and 62
as adopted for use in the Superior Court of Los
Angeles County, California

G. [85]

Defendant's Instruction No. 24

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence

is equally balanced on the issue of ^{gross} \wedge negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to

^{her} fulfill ~~his~~ burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that the cause of the

accident was one not involving ^{gross} \wedge negligence on defend-

ant's part as it is that ^{gross} \wedge negligence on ^{their} ~~his~~ part was a proximate cause, then, because the conflicting probabili-

ties are equal, a case against the defendants has not been established.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 73 as adopted
for use in the Superior Court of Los Angeles
County, California

G. [86]

Defendant's Instruction No. 25

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 58 and 58-A
as adopted for use in the Superior Court of Los
Angeles County, California

G. [87]

Defendant's Instruction No. 26

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such negligence was a proximate cause of injury to the plaintiff.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 64 as adopted for use in the Superior Court of Los Angeles County, California.

G. [88]

Defendant's Instruction No. 27

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 100 as adopted for use in the Superior Court of Los Angeles County, California

G. [89]

Defendant's Instruction No. 28

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

California Jury Instruction (Civil) 15 as adopted
for use in the Superior Court of Los Angeles
County, California

G. [90]

Defendant's Instruction No. 29

You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Beasley vs. San Jose Fruit Packing Co., 92 Cal.

388

R. [91]

Defendant's Instruction No. 30

You are instructed that an unavoidable accident is one that occurs while all parties are exercising ordinary care, and if you shall find from the evidence that both plaintiff and defendants were exercising ordinary care at the time of the accident, you shall find that the accident was unavoidable and you shall render your verdict in favor of the defendants.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Zaferis vs. Bradley, 28 Cal. App. (2) 188, at 190
G. [92]

Defendant's Instruction No. 31

You are instructed that the plaintiff was working for defendants under and by virtue of the terms and conditions of the contract between the parties hereto executed on September 24, 1936; that the same is a valid, binding and enforceable contract, and you are further instructed that under the terms and conditions thereof the defendants are released from any acts of ordinary negligence on their part in connection with the operation and management of the equipment involved in this accident. If you find that the defendants were not guilty of gross

negligence in the management and operation of the equipment involved in America Olvera's act, you are directed to bring in your verdict for the defendants.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Ringling Bros. vs. Olvera, 119 Fed. (2d) 584

G. [93]

Defendant's Instruction No. 32

Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case.

Given

~~Given as modified~~

~~Not given~~

C. E. Beaumont

Judge

Donnelly vs. So. Pac., 118 Pac. (2) 465; 18
Cal. (2) 863

R. [94]

Defendant's Instruction No. 33

"Wilful and wanton misconduct" is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.

~~Given~~

~~Given as modified~~

Not given

C. E. Beaumont

Judge

Russell v. Cleveland, etc., 169 Ill. App. 149.

R.

[Endorsed]: Filed Jan. 12, 1944. [95]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS AND EXCEPTIONS
TO PLAINTIFF'S REQUESTED INSTRUCTIONS.

Come now defendants, jointly and severally, and object and except to the plaintiff's proposed instructions to the jury, upon the following grounds:

I.

Plaintiff's proposed Instruction No. 1 purports to instruct the jury upon the issue of ordinary negligence, which is not before the jury, and fails to include the element of gross negligence, and is confusing, inconsistent and contradictory to other proposed instructions by the plaintiff upon the same subject.

II.

Plaintiff's proposed Instruction No. 2 is defective upon the ground that it does not include all the elements of contributory negligence and is inconsistent with other instructions.

III.

Plaintiff's proposed Instruction No. 3 attempts to define [96] ordinary negligence, which is not in issue, and fails to include the element of gross negligence.

IV.

Plaintiff's proposed Instruction No. 4 is confusing and not a correct statement of the law.

V.

Plaintiff's proposed Instruction No. 11 is not a correct statement of the law, is inconsistent and contradictory to the other requested instructions of the plaintiff, and is confusing and attempts to impair the obligation of contract and eliminates the defense of assumption of risk and of independent contractor; that said instruction is a formula instruction directing a verdict, and does not include all the elements of defense, and further attempts to direct a verdict based upon the contract of employment in evidence without including therein all the elements of the contract.

VI.

Plaintiff's proposed Instruction No. 12 is a formula instruction directing a verdict and must include all of the elements of defense.

VII.

Plaintiff's proposed Instruction No. 13 is confusing and contradictory to other instructions and particularly confuses definitions of gross and ordinary negligence and advises the jury that they may apparently find either gross negligence or ordinary negligence, and is not a correct statement of the law.

VIII.

Plaintiff's proposed Instruction No. 14 is a formula instruction directing a verdict, and does not include all the elements of defense, to-wit, contributory negligence, un-

avoidable accident, assumption of risk, release of damages, etc., and refers to ordinary negligence, confusing the same with gross negligence, contradictory [97] to other instructions and not a correct statement of the law.

IX.

Plaintiff's proposed Instruction No. 15 is a formula instruction directing a verdict, does not contain the elements of defense in issue, and purports to instruct on ordinary negligence, and is confusing and contradictory to other requested instructions.

X.

Plaintiff's proposed Instruction No. 16 in attempting to define the elements of damage for which the plaintiff could recover, is contradictory, inconsistent and confusing, and contains elements of damage not properly and legally recoverable in this action.

COMBS & MURPHINE

By LEE COMBS

Attorneys for defendants

[Endorsed]: Filed Jan. 12, 1944. [98]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find in favor of the plaintiff, America Olvera Pollinger, and against the defendants, Al. G. Barnes Amusement Company, a corporation, and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a corporation, and assess plaintiff's damages in the sum of Fifty thousand dollars (\$50,000.00).

Dated: Los Angeles, California, January 12, 1944.

William E. Colburn

Foreman of the Jury

[Endorsed]: Filed Jan. 12, 1944. [99]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-B

AMERICA OLVERA, also known as
AMERICA OLVERA POLLINGER,

Plaintiffs,

-vs-

AL G. BARNES, INC., a corporation, BARNES &
SELLS FLOTO COMBINED SHOWS, a corpo-
ration, RINGLING BROTHERS, BARNUM &
BAILEY COMBINED SHOWS, INC., a corporation,
Defendants.

JUDGMENT

Be it remembered that this cause came on to be heard before the Honorable Campbell E. Beaumont, Judge Presiding in the United States District Court in the Southern District, Central Division thereof at Los Angeles, California; the plaintiff, America Olvera, sometimes known as America Olvera Pollinger, appeared in person and represented by her attorney, David C. Marcus, Esq., and the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Brothers, Barnum & Bailey Combined Shows, Inc., represented by their attorneys, Lee Combs, Esq. and Robert E. Corkery, Esq., and the matter having been heard before a Jury duly impanelled to

try said cause and said cause being tried January 4, 5, 6, 7, 11 and 12, 1944, and evidence both oral and documentary having been presented and received by both plaintiff and defendants in the said matter; and the Jury having been instructed by the said Court and the said matter having been submitted to the said Jury; and the Jury having deliberated on the said matter, on the 12th day of January, 1944 did return their verdict in favor of plaintiff, America Olvera Pollinger and against the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Brothers, Barnum & Bailey Combined Shows, Inc. in the sum of Fifty Thousand (\$50,000.00) Dollars, damages [100] ges.

Now Therefore It Is the Judgment of This Court that plaintiff America Olvera Pollinger, have judgment against defendants Al G. Barnes Amusement Company, a corporation and Ringling Brothers, Barnum and Bailey Combined Shows, Inc. in the sum of Fifty Thousand (\$50,000.00) Dollars damages together with her costs taxed in the sum of \$

Dated: This 15th day of January, 1944.

C. E. Beaumont

Judge of the United States District Court.

Judgment entered Jan. 15, 1944. Docketed Jan. 15, 1944. C. O. Book 22, Page 787. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy.

[Endorsed]: Filed Jan. 15, 1944. [101]

United States District Court
Southern District of California
Central Division

NOTICE BY CLERK OF ENTRY OF JUDGMENT.

No. 8367-B Civil America Olvera, etc. vs. Al G. Barnes
 Amusement Company, et al.

David C. Marcus, Esq.,
Attorney at Law
415 Spring & Second Bldg.
Los Angeles 13, Calif.

Lee Combs, Esq., and
Robert E. Corkery, Esq.,
Attorneys at Law
925 Pacific Southwest Bldg.,
Los Angeles, Calif.

You are hereby notified that Judgment has been entered this day in the above-entitled case, in Civil Order Book No. 22, page 787.

Dated: Los Angeles, California, January 15, 1944.

EDMUND L. SMITH,
Clerk.

By R. B. Clifton,
Deputy Clerk. [102]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFF AND TO ENTER JUDGMENT IN FAVOR OF DEFENDANTS IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT BY DEFENDANTS HERETOFORE MADE AND FOR JUDGMENT NON OBSTANTE VEREDICTO

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to set aside verdict and judgment entered in favor of plaintiff herein and to enter judgment in favor of defendants in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants of any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or [103] waiver from the release clause contained in plaintiff's contract, plaintiff's Exhibit No. 1 in this action, and that the same is of binding force and effect upon plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having occurred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony, Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment.

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al G. Barnes Show,

together with the fact that plaintiff was an independent contractor, does not relieve her from the law of Kansas [104] providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants.

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection:

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) That the uncontradicted evidence in this case conclusively establishes the absence of any gross negligence or wilful misconduct whatsoever in the case, both as to the operation of the net, which was done in the due course

of the business, and in an approved manner, and in the customary manner and as directed by the plaintiff, and as to the inspection and operation of the trapeze which was likewise done in the same manner.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should set aside the verdict and judgment entered herein in favor of plaintiff and to enter judgment in favor of defendants in accordance with the motion for directed verdict by defendants heretofore made, and for judgment Non Obstante Veredicto.

January 18, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for defendants [105]

POINTS AND AUTHORITIES

On motion to have verdict and judgment entered set aside and to have judgment entered in accordance with motion for a directed verdict:

Rules of Civil Procedure for the District Courts
of the United States, Rule 50 (b)

On extension of time for hearing:

Rules of Civil Procedure for the District Courts
of the United States, Rule 6 (b)

On the point that a corporation is not liable for the torts of a subsidiary unless the subsidiary is under the complete management of the principal corporation:

Hollywood Cleaning etc. Co. vs. Hollywood Laundry Service, 217 Cal. 124;

Sherman vs. So. Pac. Co., 98 C. A. D. 550

On the point of legality of the provision in the contract exempting defendant from liability:

Restatement of the Law—Contract Paragraphs 574 and 575

On the fellow servant rule:

Cashin vs. State Highway Commission, 17 Pac. (2) 838 (Kans.)

On assumption of risk:

(a) Implied agreement:

Railway Co. vs. Schroeder, 47 Kans. 315; 27 Pac. 965;

Riverside Iron Works vs. Green, 79 Kans. 588; 100 Pac. 482;

Barnes vs. Akins, 166 Pac. 474 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584

(b) Express agreement:

Atchison T. & S. F. Ry. vs. Bancord, 71 Pac. 253 (Kans.) (71)

[Endorsed]: Filed Jan. 18, 1944. [106]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California

County of Los Angeles—ss.

Henry Bedford being sworn says: I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; I served the Motion to Set Aside Verdict and Judgment entered in favor of Plaintiff and to Enter Judgment in favor of Defendants in accordance with motion for directed verdict by Defendants heretofore made and for Judgment Non Obstante Veredicto in this action by leaving at the office of David C. Marcus, a true copy thereof; that said service was made on January 18, 1944; that there was no one in the office of David C. Marcus; that after waiting for sometime affiant left said copy on the desk of David C. Marcus.

Henry Bedford

Subscribed and sworn to before me this 21st day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for Said County
and State

[Endorsed]: Filed Jan. 24, 1944. [107]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Come now defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Inc., by Combs & Murphine, their attorneys, and move the Court to set aside the verdict returned in the above entitled cause and to grant a new trial therefor; for grounds of said motion the said defendants show to the Court the following, to-wit:

1. The verdict is contrary to the law of the case.
2. The verdict is contrary to the evidence of the case.
3. The verdict is contrary to the law and evidence in the case.
4. There is no evidence whatsoever in the record to support the verdict.
5. The verdict impairs the obligation of contract and the constitutional rights of defendants.
6. The verdict is excessive and unreasonable, and [108] unsupported by the evidence.
7. The verdict is the result of passion, prejudice and bias.
8. The Court misconducted the trial and made remarks prejudicial to defendants to the jury, in the presence of the jury and during the trial and during the argument, and during the reading of the instructions to the jury.
9. Counsel for plaintiff was guilty of misconduct before the jury during the trial and during the argument to the jury, which misconduct influenced and created bias

and prejudice against defendants in the minds of the jury.

10. The Court upon the trial of said cause, admitted improper evidence adduced by the plaintiff.

11. The Court refused to admit proper evidence offered by the defendants.

12. The Court refused to give to the jury the following proper instructions requested by defendants:

“Defendants’ Instruction No. 4

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants.”

“Defendants’ Instruction No. 1

You are instructed to return a verdict in favor of the defendants.”

“Defendants’ Instruction No. 3

I further instruct you that if you find there was a defect [109] in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff

also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants.”

“Defendants’ Instruction No. 6

If you find that the plaintiff, America Olvera, contracted by written contract to furnish a “specialty act” in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees.”

“Defendants’ Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants.”

“Defendants’ Instruction No. 9-a

The elemental idea of “negligence” is failure or omission—the failure or omission to do something which should have been done. Negligence that is “gross” involves the additional and affirmative element of intent to do or willfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure

to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness." [110]

"Defendants' Instruction No. 10

The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented."

"Defendants' Instruction No. 19

The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant."

"Defendants' Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of in-

spection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants."

"Defendants' Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity [111] for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

“Defendants’ Instruction No. 29

You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees.”

“Defendants’ Instruction No. 32

Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case.”

“Defendants’ Instruction No. 33

‘Wilful and wanton misconduct’ is such conduct as [112] amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.”

13. The Court gave erroneous instructions of its own motion on the part of plaintiff, said instructions being the following:

"Plaintiff's Instruction No. 14-A

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and [113] operation of said net, was the

proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows."

14. The Court changed and altered and modified, and gave as modified and altered, instructions requested by defendants, altering and changing the entire theory of defendants, said instructions being the following which were submitted as follows:

That defendants submitted Defendants' Instruction No. 4 reading as follows:

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

That the Court read said instruction to the jury, then instructed the jury to disregard the same, and thereupon read in lieu thereof an instruction drawn up by himself, reading as follows:

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which [114] was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

That the Court read only the following language from defendants' Instruction No. 5 as proposed:

"I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has knowledge and the independent contractor has neither actual nor constructive knowledge," omitting to read and refusing to read the following additional language:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was within the knowledge of defendants, and that

plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defects was the proximate cause of the injuries complained of you will find for the defendants.”

15. That the Court improperly held conferences with counsel for the plaintiff concerning instructions without allowing counsel for the defendants to be present, thus depriving defendants of an opportunity to gain information respecting instructions contemplated as given and therefore prohibiting defendants from meeting the altered situation produced by such course of conduct and the submission of additional instructions to cover the same as particularly appears from the affidavit of Lee Combs filed concurrently herewith.

This motion will be based upon this written notice of motion and upon all the files and records in said action, and the affidavit of Lee Combs filed concurrently herewith.

Dated this 24th day of January, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for Defendants

[Endorsed]: Filed Jan. 25, 1944. [115]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California

County of Los Angeles—ss.

Lee Combs being sworn says: I am and was on the dates herein mentioned, over the age of 18 years; that I am one of the attorneys for defendants in the above entitled action; that I served the Motion for a New Trial and Affidavit in Support of Motion for New Trial, by leaving with Inez Palafox, secretary in charge of the office of David C. Marcus, attorney for plaintiff, a true copy thereof; that said service was made on January 25, 1944.

Further affiant sayeth not.

Lee Combs.

Subscribed and sworn to before me this 25th day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for Said County
and State

[Endorsed]: Filed Jan. 26, 1944. [116]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL.

State of California

County of Los Angeles—ss.

Lee Combs being first duly sworn deposes and says: that he is over the age of 21 years; that he is one of the attorneys for defendants in the above entitled matter; that he attended and prosecuted the entire matter to completion in the trial court as such attorney.

That at the outset of this proceeding affiant submitted as a portion of Defendants' Instructions, certain instructions on the subject of master and servant, copies of which are attached hereto marked Exhibit "A" and made a part hereof as if set forth verbatim herein, being six in number; that the Court examined the same and on or about the 5th day of January, 1944, the Court informed affiant that since the case was being tried on the theory of independent contractor said instructions were unnecessary, and requested that affiant withdraw the same, upon which said statement affiant did withdraw said [117] instructions; that thereafter and during the course of the trial, the Court consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said ground alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for defendants called in at said consultations at which instructions were discussed; that thereafter the Court of

its own motion, prepared several instructions and suggested instructions to be submitted on behalf of the plaintiff; that some of said instructions were abandoned but that the Court in particular prepared and submitted and read to the jury plaintiff's Instruction 14-a, the wording of which particularly appears from the records and files in the above entitled matter and made a part of the Motion for New Trial.

That in addition thereto during the course of the trial on one or more occasions the Court, as appears from the records, when the subject of the net was involved and evidence was being taken thereon from witnesses, commented to the effect that "this appears to be an important part of the case"; that upon the submission of the case to the jury the Court read instructions which in effect gave the case to the jury on the subject of ordinary negligence in relation to the operation and management of the net, and segregated the net from the trapeze operation; that prior thereto and during the argument made by plaintiff's counsel in the above entitled action reference was made to the defendants as wealthy corporations, exploiting the plaintiff as a performer; that objection to said argument was made by affiant and the court sustained said objection and instructed the jury to disregard the same; that thereafter plaintiff's attorney continued to argue in like vein and when thus prejudicing and influencing the jury against defendants intimated other things and plaintiff closed his argument with the statement "we have had to fight mighty hard for this judgment. Give this woman all she asks for." [118]

That the Court stopped affiant when affiant was informing the jury of the law relating to matters con-

cerning this case as he expected the Court to give it; that this constituted prejudicial conduct as to defendants' cause.

That the Court in holding private conferences concerning instructions with opposing counsel, left counsel for defendants uninformed of his intention regarding instructions, both as to the submission of plaintiff's Instruction 14-a and in relation to the correction and alteration and change of defendants' instruction.

That the change in these instructions and the rejection of certain instructions submitted on behalf of the defendants, which rejection counsel for defendants were first informed of upon the reading of the instructions to the jury, prohibited defendants' counsel from re-submitting instructions to the jury on the master and servant doctrine; that affiant is informed and believes that the jury found against the defendants on the theory that the contract had been abrogated and waived and the release therefor abrogated and waived by virtue of defendants supplying plaintiff with the net and operating same themselves and decided the case on ordinary negligence and against defendants on that question; that the course and conduct of the Court as indicated was one of bias and prejudice and said course, consistently carried out, developed and created in the mind of the jury a prejudice against defendants with the result that the verdict rendered in the above entitled matter was the result of passion, prejudice and influence.

Wherefore, affiant prays that a new trial be granted and for such other and further relief as is meet and proper.

Lee Combs

Subscribed and sworn to before me this 24th day of January, 1944.

(Seal)

Jessie Woodruff

Notary Public in and for said County
and State [119]

EXHIBIT "A"

"Defendants' Instruction No. 12

The Court instructs the jury if you find defendants' servants who were acting with the plaintiff at or just before the time of her injury, either in arranging the rigging or apparatus known as a trapeze, or in holding a net for the purpose of catching an operator in an accidental fall from a trapeze, were directly cooperating with the plaintiff and with each other in the particular business in hand, to-wit, a circus exhibition or performance, and that the duties of such servants and the plaintiff brought them into habitual association for the purpose of said circus exhibition or performance and at the time of the injury or immediately prior thereto they were directly cooperating with each other in promoting a circus exhibition or performance, and if you believe from the evidence that the plaintiff, America Olvera, and the men assisting her at the time of the alleged injury were all in the employ of the defendants, then the court instructs the jury that under the law of the State of Kansas, where the injury complained of occurred, the said plaintiff America Olvera and the said rigging men and net holders, were fellow servants and if the jury further believes from the evidence that the injury received by plaintiff was occasioned by her own carelessness and negligence

or through the carelessness and negligence of her fellow servants, then under the law of Kansas defendant would not be liable to the plaintiff if said defendants were otherwise without fault."

"Defendants' Instruction No. 13

The court instructs the jury that no person or corporation is responsible for injuries to an employee occasioned by the negligence or unskillfulness of a fellow servant engaged in the same line of service, provided the employer has taken proper care and caution to engage proper servants to perform the duties assigned to them, nor is the employer liable for injuries thus sustained if the person injured was, while engaged as such servant, acquainted with the character of such fellow servant for capacity, prudence and skill." [120]

"Defendants' Instruction No. 14

The jury are instructed as a matter of law in the State of Kansas that a servant when she enters the service of an employer impliedly agrees that she will assume all risks which are ordinarily and naturally incident to the particular service in which she engaged, and if the jury believe from the evidence that the injury to the plaintiff was only the result of one of the risks ordinarily incident to the work in which she was engaged and not otherwise, then she cannot recover in this case and your verdict should be for the defendants."

"Defendants' Instruction No. 15

The jury are instructed that a servant when she engaged in a particular employment, is presumed to do so with a knowledge of and a taking of the risks of its ordi-

nary hazards, whether from the carelessness of fellow servants in the same line of employment or from defects in the apparatus or appliances used in the business or in the ordinary dangers in the use of the same.”

“Defendants’ Instruction No. 16

The jury are instructed that where an employment is attended with danger, a servant engaging in it assumes the hazards of the ordinary perils which are incident to it, and if she receives an injury from an accident which is an ordinary peril of the service undertaken by her, she cannot recover damages for such injury.”

“Defendants’ Instruction No. 18

You are instructed if you find that any negligence which was the proximate cause of the injury to plaintiff was caused by the act of a foreman in the employ of the defendants, who was in charge of and directing other employees and servants engaged in working with the plaintiff to the common purpose of providing a trapeze act for defendant circus, and such foreman while directing was working with such other employees, you will find that such foreman was also a fellow servant of the plaintiff and as the fellow servant rule is in [121] full force and effect in the State of Kansas the employer is not liable to those engaged in his employment for injuries suffered by them as a result of the negligence, carelessness or misconduct of other servants of the same employer engaged in the same common employment.”

[Endorsed]: Filed Jan. 25, 1944. [122]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between respective counsels: That plaintiff may have up to and including February 25th, 1944 to file counter affidavits in the above matter.

Dated: This 3rd day of February, 1944.

David C. Marcus

Attorney for Plaintiff

COMBS & MURPHINE

By Lee Combs

Attorney for Defendants.

It Is So Ordered.

C. E. Beaumont

Judge of the U. S. District Court

[Endorsed]: Filed Feb. 25, 1944. [123]

[Title of District Court and Cause.]

AFFIDAVIT

State of California

County of Los Angeles—ss.

David C. Marcus, being first duly sworn deposes and says:

That he is the attorney for the plaintiff in the above entitled matter and during all stages of the proceedings has been and now is her attorney. Plaintiff's complaint and defendants' answer, thereto are predicated upon the contractual relationship of the plaintiff and defendants which contract was introduced in evidence and established the theory of both plaintiff and defendants' case, viz: that the relationship existing between the parties to the action was that of Independent Contractor and Contractee. There is not now nor has there ever been an issue in this case involving master and servant or fellow servant doctrine. During the trial of said matter both plaintiff and defendants' counsel were in conference with the court respecting the proposed instructions and plaintiff's counsel advised [124] defendants' counsel that certain of his proposed instructions dealing with the master and servant and the fellow servant doctrine were inapplicable to his theory of the case and the issues framed. Whereupon defendants' counsel stated that such was the fact and voluntarily and of his own motion requested the Court to withdraw and not to consider or give any and all his instructions dealing with the fellow servant and master *servant* doctrine. That said instructions are not and have never been a part of the record or files or requested in-

structions by the defendants. That it is not true that the Court consulted privately with David C. Marcus, attorney for the plaintiff and discussed with him at said private meeting, instructions submitted to the parties to this action. That at a conference held in the Court's Chambers on January 8, 1944, attended by both plaintiff and defendants' counsel, the proposed instructions of plaintiff and defendants were discussed by the Court and counsel for both plaintiff and defendants. At said time plaintiff's instruction Number 14 had been submitted and discussed by counsel for plaintiff and defendants and the Court. At that time the Court stated to respective counsel that it did not intend to give plaintiff's instruction Number 14 in the form offered but would correct, modify and give same as plaintiff's instruction and number 14-A which your affiant requested the Court so to do. It is not true that on one or more occasions the Court when the subject of a net was involved commented to the effect that "This appears to be an important part of the case" but alleges the true fact to be that plaintiff's counsel had on preliminary questions asked of a witness questions which tended to be leading, which questions were objected to by defendants and objection sustained. When the vital issues of the case were reached at the request of defendants' counsel, the Court admonished plaintiff's counsel to refrain from asking leading questions as we were reaching the vital issues and appears to be the important part of the case. It is not true that the Court read any instructions which in effect gave the case to the jury on the subject [125] of ordinary negligence in relation to the operation and management of the net and segregated the net from the trapeze operation. It is not

true that Court held private conferences concerning instructions with plaintiff's counsel but that at the meeting held in the Court's Chambers as before mentioned on January 8, 1944, attended by both counsel for plaintiff and defendants all proposed instructions were discussed, corrected and modified and the Court indicated in what particular he intended to correct, modify and give as plaintiff's, defendants' and its own instructions. The defendants and plaintiff were both cognizant what instructions the Court intended to give on behalf of both parties and on its own motion and neither party was stopped in argument to the jury on the said instructions as the Court intended to give.

Wherefore your affiant prays that the motion for a new trial be denied.

Dated: This 21st day of February, 1944.

DAVID C. MARCUS
Attorney for Plaintiff

Subscribed and sworn to before me this 21st day of February, 1944.

(Seal)

J. B. MANDEL

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 25, 1944. [126]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between respective counsel: That the motion for new trial in the above entitled matter will be heard on the 6th day of March, 1944, at the hour of 2 P. M. before the above entitled Court.

March

Dated: This 1st day of ~~February~~, 1944.

David C. Marcus

Attorney for Plaintiff.

Lee Combs

Attorney for Defendants.

It is so ordered. Mar. 6 - 1944.

Judge

[Endorsed]: Filed Mar. 6, 1944. [127]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 7th day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B Law

America Olvera Pollinger,

Plaintiff,

v.

Al G. Barnes Amusement Co., a corp., et al.,

Defendants.

This cause coming on for (1) further hearing motion of defendants, filed January 18, 1944, to set aside verdict and judgment entered in favor of plaintiff, and to enter judgment in favor of defendants in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, pursuant to stipulation filed March 6, 1944; and (2) further hearing motion of defendants, filed January 25, 1944, for new trial, pursuant to stipulation filed March 6, 1944; David Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs and Robert E. Corkery, Esqs., appearing as counsel for the defendants; and H. A. Dewing, Court Reporter, being present and reporting the proceedings;

Attorney Combs continues argument. At 11:20 A. M. court recesses. At 11:35 A. M. court reconvenes. Attorney Marcus argues. At 12:53 P. M. Attorney Combs argues further. At 1:12 P. M. the Court denies (1) motion to set aside verdict, etc., and orders that (2) motion for a new trial stand submitted. [128]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 30th day of June, in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable C. E. Beaumont, District Judge.

No. 8367-B Law

America Olvera Pollinger,

Plaintiff,

v.

Al. G. Barnes Amusement Company, a corporation, et al.,
Defendants.

This cause coming on for decision on motion for a new trial; David Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs, Esq., appearing as counsel for the defendants; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

Defendants' motion for a new trial having heretofore been heard by the Court, and counsel having argued the same, and the Court having duly considered the same and being fully advised as to the facts and the law, now reads opinion and denied said motion. [129]

[Title of District Court and Cause.]

NOTICE.

To America Olvera, also known as America Pollinger,
plaintiff, and to David C. Marcus, her attorney:

You, and Each of You, will please take notice that the undersigned has filed a stay bond on execution in the above entitled matter in the amount of \$62,500.00. You will therefore govern yourselves accordingly.

Dated this 3rd day of August, 1944.

COMBS & MURPHINE

By Lee Combs

Attorneys for Defendants

[Endorsed]: Filed Aug. 3, 1944. [130]

[Title of District Court and Cause.]

STIPULATION.

It Is Hereby Stipulated by and between Lee Combs, attorney for defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and David C. Marcus, attorney for plaintiff, that the bond for supersedeas and cost bond on appeal as to Ringling Bros.-Barnum & Bailey Combined Shows, Inc., may be fixed at the sum of \$62,500.00 and that said bond may serve both as cost and stay bond.

Dated this 3 day of August, 1944.

COMBS & MURPHINE
LEE COMBS

By Lee Combs
Attorney for Defendants

David C. Marcus
Attorney for Plaintiff

[Endorsed]: Filed Aug. 3, 1944. [131]

[Title of District Court and Cause.]

ORDER FOR SUPERSEDEAS AND COST BOND
ON APPEAL.

A judgment for the sum of \$50,000.00 in favor of the plaintiff and against defendants having been entered in the office of the Clerk of this court on the 15th day of January, 1944, and an appeal having been allowed;

Now, on motion of Combs & Murphine and Lee Combs, attorneys for defendants, it is ordered that execution and all proceedings in this suit be stayed as to defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., pending hearing and determination of the said appeal and the coming down to this court of the mandate of the Circuit Court of Appeals, for the Ninth Circuit, upon filing by the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. of a supersedeas bond for \$62,500.00 approved by the Judge of this Court.

It is further ordered that said bond in the sum of \$62,500.00 if filed and approved, shall serve and suffice as both a supersedeas and a cost bond.

Dated this 3rd day of August, 1944.

C. E. BEAUMONT
Judge

[Endorsed]: Filed Aug. 3, 1944. [132]

[Title of District Court and Cause.]

BOND ON APPEAL TO STAY EXECUTION.

Know All Men By These Presents, that we, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., Defendant in the above entitled action, as Principal, and United States Guarantee Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, as Surety, are held and firmly bound unto America Olvera, also known as America Pollinger, Plaintiff, in the sum of Sixty-two Thousand Five Hundred (\$62,500.00) Dollars, lawful money of the United States of America, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that

Whereas, the above named defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., has appealed, or is about to appeal to the United States Circuit Court of Appeals for the Ninth *District*, from the judgment entered in favor of the plaintiff, and against the Defendant, in the above entitled Court and in the above entitled action, on or about the 15th day of January, 1944, for the sum of \$50,000.00 Judgment and \$..... costs of suit, and \$..... interest.

Now, Therefore, in consideration of said appeal and stay of execution and of the premises, if the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. shall prosecute its writ on [133] appeal to effect, and shall satisfy the judgment in full together with costs,

interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed against defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award against Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant, then this obligation shall be void; otherwise, to remain in full force and effect.

Said Surety does hereby consent that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

In Witness Whereof, the corporate seal and name of the said Principal is hereto affixed and attested by its duly authorized officer and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officer at Los Angeles, California, this 31st day of July, 1944.

(Seal) Ringling Brothers Barnum & Bailey
Combined Shows Inc
By W. P. Dunn Jr. Treas
Principal

(Seal) United States Guarantee Company
By Esther M. Daniels
Attorney-in-Fact
And Delorus E. Clark
Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1944, before me, M. S. Banks, a Notary Public in and for the said County and State, personally appeared Esther M. Daniels and Delorus E. Clark, known to me to be the persons whose names are subscribed to the within Instrument, as the Attorneys-in-Fact of United States Guarantee Company and acknowledged to me that they and each of them subscribed the name of United States Guarantee Company thereto as principal and their own names as Attorneys-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

M. S. BANKS

Notary Public in and for said County and State

My commission Expires Feb. 2, 1947.

Examined and recommended for approval as provided in Rule 13.

Lee Combs

Attorney

I hereby approve the foregoing this 3rd day of August, 1944.

C. E. Beaumont

District Judge [134]

State of New York

County of New York—ss.

On the 24th day of July, 1944, before me Helen E. Fitzgerald, a notary public, in and for said county and state, residing therein, duly commissioned and sworn, personally appeared W. P. Dunn, Jr. known to me to be the Treasurer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc., the corporation that executed the within instrument, and acknowledged to me that he subscribed the name of Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and his own name as such officer thereto.

Helen E. Fitzgerald

(Affix seal here)

Notary Public

My Commission expires

Helen E. Fitzgerald

Notary Public, New York County

N. Y. Co. Clk's No. 315, Reg. No. 418F5

(Seal)

Certificates filed in

Bronx Co. Clk's No. 36, Reg. No. 162-F-5

Queens Co. Reg. No. 155-F-5

Westchester County

Commission expires March 30, 1945

State of New York

County of New York—ss

No. 7188

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, Do Hereby Certify, That Helen E. Fitzgerald whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for said County, duly commissioned and sworn and qualified to act as such and authorized by the laws of the State of New York to protest notes, to take and certify depositions, to administer oaths and affirmations and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer with *his* autograph signature filed in my office, and believe that the signature to the said annexed instrument is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 25 day of July, 1944.

(Seal)

ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County [135]

State of

County of

—ss.:

On this 31st day of July, 1944, before me personally came Esther M. Daniels to me known and by me known to be an Attorney-in-Fact of the United States Guarantee Company, the corporation described in and which

executed the annexed bond on behalf of Ringling Bros. Barnum & Bailey Combined Shows, Inc. and the said Esther M. Daniels being by me duly sworn, did depose and say that *he* resides in the City of Los Angeles in the State of California; that *he* is an Attorney-in-Fact of said United States Guarantee Company, and knows the corporate seal thereof; that the seal affixed to said annexed instrument is such corporate seal, and was thereto affixed by authority of the Power of Attorney of said Company, of which a certified copy is hereto attached, and that *he* signed said annexed instrument as an Attorney-in-Fact of said Company by like authority; and that *he* is acquainted with Delorus E. Clark and knows *him* to be also an Attorney-in-Fact of said Company and that the signature of said Delorus E. Clark subscribed to said annexed instrument is in the genuine handwriting of said Delorus E. Clark and was thereto subscribed by like authority and in deponent's presence; that the assets of said Company, unencumbered and liable to execution, exceed its debts, claims and liabilities of every nature by more than the sum of three million dollars, and that *he* believes the attached statement of said Company's assets and liabilities, signed by deponent, is true and correct.

ESTHER M. DANIELS
Deponent's Signature

Subscribed, Acknowledged and Sworn to before me on the date above written.

M. S. BANKS,
Notary Public

(Officer's Signature, Description and Seal)

My Commission Expires Feb. 2, 1947.

(Certified Copy Power of Attorney, authorizing
execution of Bonds.)

Power of Attorney

Know All Men by These Presents, that the United States Guarantee Company of New York City, New York, a corporation of the State of New York, has constituted and appointed, and does hereby constitute and appoint R. G. Hillman, R. H. Hillman, M. S. Banks, S. E. Nutt, Jared C. Aiken, A. J. Eggenberger, Walter H. Duff, Esther M. Daniels, C. J. Hoekstra, Mary L. Branch and Delorus E. Clark of Los Angeles, California, and Charles Seeley and Edmund T. King of San Francisco, California, each its true and lawful Attorney-in-Fact to execute jointly with each of the others, under such designation in this Company's name and to affix its corporate seal to and deliver for and on its behalf, as surety thereon or otherwise, bonds or obligations of either of the following classes, to wit:

1. Bonds or obligations required on bids or proposals made by any bidder, or to secure the performance of contracts made by any contractor, for furnishing supplies to, or for furnishing labor and materials and performing any work for, the United States of America, or any State, City, Town, Village, Board, or others, or to secure payment for any such labor or materials, or the fulfillment of any guarantees for maintenance thereof, and consents to

modifications or alteration of bids, proposals or contracts the performance of which has been guaranteed under such bonds or obligations;

2. Bonds to the United States of America which are required or permitted under laws or regulations relating to the Customs or Internal Revenue;
3. Bonds for Notaries Public within the State of California and bonds required by the laws, ordinances or regulations of any State, City, Town, Village, Board or other body or organization, public or private, for obtaining a License or Permit for exercising any privilege or doing or carrying on any work, business or occupation;
4. Bonds to Transportation Companies to secure payment of transportation charges, or for delivery of freight prior to surrender of Bill of Lading;
5. Bonds and undertakings (except bonds on behalf of fiduciaries) required or permitted by law to be given or filed in any suit, matter or proceeding in any Court of the United States, or in any State or other court, or given to or filed with any Sheriff or Magistrate within any State, for the doing or not doing of anything specified in such Bond or Undertaking, in which the penalty of the bond or liability incurred under such undertaking does not exceed one hundred thousand dollars (\$100,000);

6. Any other bond or undertaking, the execution of which shall be authorized by letter addressed to either of said Attorneys-in-Fact, signed by George H. Reaney, President, or John T. Jones or William E. Schenck or James G. Cannon or Nathan Mobley or Edward E. Stalling, Vice-Presidents of this Company, and sealed with this Company's corporate seal, attested by its Secretary or one of its Assistant Secretaries;

—and the execution of any and all such bonds and undertakings by any two of such Attorneys-in-Fact, in this Company's name and on its behalf as surety thereon or otherwise, under its corporate seal, in pursuance of the authority hereby conferred shall, upon delivery thereof, be valid and binding upon this Company.

In Witness Whereof, the said United States Guarantee Company has, pursuant to its By-Laws, caused these presents to be signed by its Vice-President and Assistant Secretary and its corporate seal to be hereto affixed this 8th day of April, 1940.

UNITED STATES GUARANTEE COMPANY

By

James G. Cannon

Vice-President

Ward E. Flaxington,

Assistant Secretary [Corp. Seal] [136]

State of New York

County of New York—ss.

On this 8th day of April, 1940, before me personally came Ward E. Flaxington to me known and by me known to be Assistant Secretary of the United States Guarantee Company, the corporation described in and which executed the foregoing Power of Attorney to R. G. Hillman, R. H. Hillman, M. S. Banks, S. E. Nutt, Jared C. Aiken, A. J. Eggenberger, Walter H. Duff, Esther M. Daniels, C. J. Hoekstra, Mary L. Branch, Delorus E. Clark, Charles Seeley and Edmund T. King and the said Ward E. Flaxington being by me duly sworn did depose and say that he resides in the City of New York, in the State of New York; that he is Assistant Secretary of the United States Guarantee Company and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company, and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; that he is acquainted with James G. Cannon and knows him to be Vice-President of said Company and that the signature of said James G. Cannon subscribed to said Power of Attorney is in the genuine handwriting of said James G. Cannon and was thereto subscribed by authority of said by-laws and in deponent's presence.

WARD E. FLAXINGTON.

Subscribed, Acknowledged and Sworn to before me on the date above written.

[Notarial Seal]

DAVID OSSMAN

Notary Public, Queens Co. No. 3421

Commission Filed in New York Co. No. 249

Commission expires March 30, 1941

City and County of New York: ss.

I, George J. Zwier, Assistant Secretary of the United States Guarantee Company, do hereby certify that the following is a true excerpt from the By-Laws of said Company as adopted by its Board of Directors on February 6, 1929, and that the same has not since been amended or rescinded, to-wit:

“Article VII. Execution of Bonds, etc.

Sec. 1. All bonds, undertakings, contracts, powers of attorney and other instruments for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company by its President, or a Vice-President, jointly with its Secretary, or an Assistant Secretary, under their respective designations, except that:

(a) any officer or officers, agent or agents, attorney-in-fact or attorneys-in-fact designated in any resolution of the Board of Directors or Executive Committee adopted either before or after the making of this By-Law, or in any power of attorney executed as provided for in this section, may execute in the manner prescribed in such resolution or power

of attorney any such bond, undertaking or other obligation which he or they shall be empowered to execute by such resolution or power of attorney:"

And I further certify that I have compared the foregoing copy of the Power of Attorney with the original thereof executed by said United State Guarantee Company to R. G. Hillman, et al., dated April 8th, 1940, and the same is a correct and true copy of the whole of said original Power of Attorney and that said Power of Attorney has not been revoked.

And I further certify that said United States Guarantee Company is duly licensed to transact fidelity and surety business in the State of California and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by the laws of the United States.

Given under my hand and the seal of said Company at New York City, N. Y., this 31st day of July, 1944.

George J. Zwier
Assistant Secretary

[Endorsed]: Filed Aug. 3, 1944. [137]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To America Olvera, also known as America Pollinger, plaintiff, and to David C. Marcus, her attorney; to Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., defendant, and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, its attorneys:

Notice Is Hereby Given that Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in the above entitled action on January 15th, 1944.

Dated this 4th day of August, 1944.

COMBS & MURPHINE
GEORGE P. KINKLE
JOHN S. HUNT
LEE COMBS

By Lee Combs

Attorneys for defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

Mailed copy to David C. Marcus, atty. for plf. and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attys. for defts.

[Endorsed]: Filed Aug. 14, 1944. [138]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To America Olvera, also known as America Pollinger, plaintiff, and to David C. Marcus, her attorney; to Ringling Bros.-Barnum & Bailey Combined Shows, Inc., defendant, and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, its attorneys:

Notice Is Hereby Given That Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., a corporation, defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in the above entitled action on January 15, 1944.

Dated this 4th day of August, 1944.

COMBS & MURPHINE
GEORGE P. KINKLE
JOHN S. HUNT
LEE COMBS

By Lee Combs

Attorneys for defendant Al G. Barnes Amusement Company, sued herein as Al G. Barnes Inc.

Mailed copy to David C. Marcus, atty. for plf; and to Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attys. for defts.

[Endorsed]: Filed Aug. 14, 1944. [139]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that United States Guarantee Company, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact business in the State of California, is held and firmly bound unto America Olvera, also known as America Pollinger, plaintiff and respondent in the above entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to said plaintiff and respondent, her successors, assigns or legal representatives, for which payment well and truly to be made, United States Guarantee Company, a corporation, binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such, that whereas, Al G. Barnes Amusement Company, a corporation, sued herein as Al G Barnes, Inc., a corporation, one of the defendants and appellants in the above entitled action, is about to take an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment made and entered on or about the 15th day of January, 1944, in favor of the plaintiff and respondent by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which

may be adjudged [140] against it if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It is hereby agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 1st day of August, 1944.

UNITED STATES GUARANTEE COMPANY

By Jared C. Aiken

Attorney in Fact

And Esther M. Daniels

Attorney in Fact (Seal)

State of California

County of Los Angeles—ss.

On This 31st day of July, A. D. 1944, before me, M. S. Banks, a Notary Public in and for the said County and State, personally appeared Esther M. Daniels and *Delorus E. Clark*, known to me to be the persons whose names are subscribed to the within Instrument, as the Attorneys-in-Fact of United States Guarantee Company and acknowledged to me that they had each of them sub-

scribed the name of United States Guarantee Company thereto as principal and their own names *at* Attorneys-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal)

M. S. BANKS

Notary Public in and for said County and State.

My Commission Expires Feb. 2, 1947.

Examined and recommended for approval as provided in Rule 13.

Lee Combs

Attorney

I hereby approve the foregoing this day of August, 1944.

.....

Judge

[Endorsed]: Filed Aug. 14, 1944. [141]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and on behalf of the respective parties to the above entitled cause, that all the original papers and exhibits in the above entitled matter should be inspected by the Appellate Court and sent to the Appellate Court in lieu of copies, and that the District Court may make such order therefor and for the safe keeping, transportation and return thereof, as it deems proper.

The exhibits necessary to be so transmitted are plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6, and defendants' Exhibits "A," "B."

Dated this 31 day of August, 1944.

David C. Marcus

Attorney for Plaintiff

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

LEE COMBS

By Lee Combs

Attorneys for Defendants [142]

ORDER

On the annexed stipulation and on motion of Combs & Murphine, George P. Kinkle, John S. Hunt and Lee Combs, attorneys for appellants;

It Is Ordered that plaintiff's Exhibits Nos. 1, 2, 3, [J.F.T. O'Connor, Judge] and "B" 4, 5 and 6, and defendants' Exhibit "A" \wedge be sent to the Appellate Court in the above entitled matter to be inspected by it in lieu of copies thereof, and that the Clerk of the District Court is hereby designated and ordered to attend to the safe-keeping, transportation and return thereof to this court after the disposition of this matter on appeal.

Dated this 30 day of Aug., 1944.

J. F. T. O'Connor
Judge

[Endorsed]: Filed Aug. 30, 1944. [143]

[Title of District Court and Cause.]

DEFENDANTS' RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. and AL G. BARNES AMUSEMENT COMPANY, a corporation, sued herein as Al G. Barnes Inc., DESIGNATION OF DOCUMENTS, RECORDS AND PROCEEDINGS TO BE INCLUDED IN RECORD ON APPEAL, INCLUDING REPORTER'S TRANSCRIPT.

Come now the defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company, a corporation, sued herein as Al G. Barnes Inc., and designate the following documents, records and proceedings and portions of the record which they believe necessary to a proper determination of the above entitled case on appeal, including the reporter's transcript of the testimony received during the trial:

1. The following exhibits marked in evidence: Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6; Defendants' Exhibits A, B.
2. The amended complaint.
3. The motion of Al G. Barnes Amusement Company to dismiss.
4. Memoranda of order signed by Judge Cosgrave respecting said motion to dismiss.
5. The verified answer of defendant Al G. Barnes Amusement Company. [144]
6. Order concerning the filing of a verified answer by Al G. Barnes Amusement Company.
7. The separate answer of defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

8. The amendment to the answer of Al G. Barnes Amusement Company filed January 18, 1940.

9. Amendment to answer of defendants filed January 6, 1944.

10. The order under Rule 16, Rules of Civil Procedure, signed by Judge Neterer.

11. Motion for directed verdict filed by defendants Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company.

12. The verdict of the jury.

13. The judgment of the Court after verdict.

14. The Court's instructions (a), (b), (c), and 14-a.

15. Plaintiff's instructions 4, 5, 6, 7, 8, 9, 10, 14, 14-a and 16.

16. Defendants' instructions, together with all notations of the Court thereon, 1, 2, 3, 4, 5, 6, 7, 8, 9, 9-a, 10, 11, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33.

17. Any and all other instructions proposed or filed in the above entitled matter, comprising all of the instructions requested and filed in said matter by the parties hereto.

18. Defendants' objections and exceptions to plaintiff's requested instructions.

19. Memo order re directed verdict, January 11, 1944.

20. Notice of entry of judgment.

21. Motion to set aside verdict and judgment entered in favor of plaintiff and to enter judgment in favor of defendants, in accordance with motion for directed verdict by defendants heretofore made and for judgment non obstante veredicto, and authorities thereto attached. [145]

22. Affidavit of service of motion to set aside verdict and judgment entered in favor of plaintiff, etc.

23. Motion for new trial.

24. Affidavit of service of motion for new trial and affidavit in support of motion for new trial.

25. Affidavit of Lee Combs in support of motion for new trial.

26. Stipulation concerning counter-affidavits re new trial.

27. Affidavit of David C. Marcus in connection with motion for new trial.

28. Stipulation re hearing motion for new trial.

29. Order concerning motions for new trial and for judgment non obstante veredicto.

30. Order re motion for new trial.

31. Notice concerning the filing of stay bond on execution and appeal bond.

32. Order for supersedeas and cost bond on appeal.

33. Stipulation concerning cost and stay bond on appeal.

34. Stay bond and cost bond of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. in the sum of \$62,500.00, including order of court approving same.

35. Undertaking for costs on appeal filed by Al G. Barnes Amusement Company, including order of court approving same.

36. Notice of appeal of Al G. Barnes Amusement Company.

37. Notice of appeal of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

38. Stipulation and order thereon providing for transmission of exhibits without copying, under Rule 75-I.

39. This designation of documents, records and proceedings to be included in record on appeal, including reporter's transcript.

40. The entire reporter's transcript of the testimony and [146] proceedings before the trial court, including the exhibits introduced in evidence and transcribed therein and including the objection to the introduction of proof made at the outset of the trial by defendants; the motion for nonsuit by defendants; the motion for directed verdict by defendants and all objections to the introduction of evidence and the rulings of the court thereon, and all instructions given and all objections to the giving or failure to give any instructions in the above entitled matter made by any of the parties hereto, and all argument by counsel to the jury, statements to the jury, and statements by the Court to the attorneys and to the jury during the course of the trial.

The foregoing comprises the entire record and all the proceedings in the above entitled matter.

Two copies of said transcript are filed herewith.

Dated this 30 day of August, 1944.

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

LEE COMBS

By Lee Combs

Attorneys for Defendants.

Received copy of the within designation this 30 day of August, 1944.

David C. Marcus

Attorney for

[Endorsed]: Filed Aug. 30, 1944. [147]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 147 inclusive contain full, true and correct copies of Amended Complaint for Personal Injuries; Motion of Al G. Barnes Amusement Company to Dismiss; Memorandum of Order; Order; Answer of Al G. Barnes Amusement Company, etc., to Amended Complaint; Separate Answer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.; Amendment to Answer of Al G. Barnes Amusement Company; Amendment to Answer of Defendants; Order Under Rule 16 of Rules of Civil Procedure; Motion for Directed Verdict; Minute Order Entered January 11, 1944; Jury Instructions; Defendants' Objections and Exceptions to Plaintiff's Requested Instructions; Verdict; Judgment; Notice of Entry of Judgment; Motion to Set Aside Verdict and Judgment Entered in Favor of Plaintiff and to Enter Judgment in Favor of Defendants in Accordance with Motion for Directed Verdict by Defendants Heretofore Made and for Judgment Non Obstante Verdicto; Affidavit of Service of Motion to Set Aside Verdict, etc.; Motion for New Trial; Affidavit of Service of Motion for New Trial; Affidavit of Lee Combs in Support of Motion for New Trial; Stipulation and Order re Filing of Counter-Affidavits; Affidavit of David C. Marcus in Opposition of

Motion for New Trial; Stipulation Fixing Time for Hearing Motion for New Trial; Minute Orders Entered March 7, 1944 and June 30, 1944 respectively; Notice of Filing of Stay Bond; Stipulation re Supersedeas and Cost Bond on Appeal; Order for Supersedeas and Cost Bond on Appeal; Bond on Appeal to Stay Execution; Notice of Appeal of Ringling Bros.-Barnum & Bailey Combined Shows, Inc.; Notice of Appeal of Al G. Barnes Amusement Company; Undertaking for Costs on Appeal; Stipulation and Order for Transmission of Original Exhibits; and Designation of Record on Appeal which, together with Two Volumes of Original Reporter's Transcript and Original Plaintiff's Exhibits 1 to 6 inclusive and Original Defendants' Exhibit A constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$24.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of September, 1944.

[Seal]

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

David C. Marcus, Esq.,
For Plaintiff.

Lee Combs, Esq.,
For Defendants.

Los Angeles, California, Tuesday, January 4, 1944;
10 A. M.

AMERICA OLVERA POLLINGER,

the plaintiff herein, called as a witness in her own behalf,
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: Your full name, please?

A. America Olvera Pollinger.

Q. Have you been known as America Olvera?

A. Yes, sir.

Q. Miss Olvera, what is your age at the present time?

A. I am 35 years old.

Q. Where were you born?

A. Mazatlan, Sinaloa, Mexico.

Q. Are you a naturalized American citizen?

A. Yes, sir.

Q. When did you first begin to learn the trapeze
work? A. When I was five years of age.

Q. Where was that? A. In Mexico.

(Testimony of America Olvera Pollinger)

Q. By whom were you taught?

A. By my father.

Mr. Combs: It may be understood that my objection stated to the court, and likewise the ruling, goes to this entire line of questioning?

The Court: So understood. [2*]

Q. By Mr. Marcus: Miss Olvera, were you a member of a troupe of artists in Mexico? A. Yes, sir.

Q. Who did this troupe compose?

A. There was my own family, composed of my father, mother, brothers, sisters, uncles, and aunts, grandfather and grandmother, and so forth, for five generations before me, were trapeze artists.

Q. You had brothers and sisters in the act, you say?

A. Yes.

Q. How many were there? A. 16.

Q. Brothers and sisters? A. Yes, sir.

Q. When did you first begin to learn your trapeze act?

A. The very first beginning when I was five years old; that was not on the trapeze. My dad began balancing me with the palm of his hand, and with my two feet, he held me like that, and walked and sat me down and up; and when I was six years old, he made my first trapeze, and I had to practice on that.

Q. You traveled with your family, did you, through the Republic of Mexico? A. Yes, sir, I did.

Q. This was ever since you were born?

A. Ever since. I was born on the road. [3]

(Testimony of America Olvera Pollinger)

Q. When did you first learn, so far as your act is concerned—I might ask you, you learned the routine, you learned the act you used during your entire lifetime?

A. Yes, sir, that was the only one I ever knew.

Q. What was the first routine you learned?

A. The very first routine I learned was to stand up in the trapeze, which was a wide trapeze, according to my body, and I learned to stand frontwise, with my two hands like that, looking straight to one point, swinging my hands to keep my balance. When I secured that exercise, I learned to stay sideways with the line in front of my face, and my two arms open, and when I secured that exercise I learned to take off one of my feet, and so on; when I secured one exercise I began to learn the other.

Q. What was the second routine you learned?

A. The second routine I learned was to kneel down in the trapeze.

The Court: Mr. Colburn, can you hear the witness' testimony?

Juror Colburn: Yes.

The Court: Let the record show that the court addressed No. 1 juror in the box, which is the furthest away from the witness stand.

Q. By Mr. Marcus: What was the second act you learned?

A. The second act I learned was to kneel down on the trapeze. After I secured the balance kneeling down then I [4] learned to take off one of my knees and learned to kneel on just one, and stretch out my hand and other leg. Then I put my knee back on the trapeze, and put a silk handkerchief on my knees, and picked it

(Testimony of America Olvera Pollinger)

up with my mouth, with my two hands crosswise like that, on my back.

Q. And your third?

A. The third one was to stand steady on the trapeze, frontwise, with my hands high, and jump up in the air, and come back on the trapeze in the original position; and then stand with my head down on the trapeze, and my legs out; then I took two big chairs, and put the two back legs on the bar and balanced, and I went up to the top four feet, and opened my hands out. Then I learned to jump like the prizefighters, doing exercises like with a rope, standing on the bar of the trapeze, frontwise. I stood there with the rope, and I held my body steady, and jumped, putting the rope between the trapeze and my feet, until I did it four times. Then, after some time, with that exercise, my dad began teaching me to swing on the trapeze frontwise, and jumping in front, and when it was swinging in back, I jumped that way, and I threw the rope out. I learned to stand on my hands and I learned to stand frontwise in the trapeze, and with my two hands out, I would swing, and would oscillate on my body until the trapeze turned this way, and then with the lines twisted, always with my hands out, I never did touch the line; then I would stay steady on one of my feet, with the foot [5] out, and wait until the trapeze untwisted itself, and when the trapeze untwisted itself—

The Court: Mr. Marcus, do you think it is important to go through these details, until she did attain the position of a recognized trapeze artist?

Mr. Marcus: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

(Testimony of America Olvera Pollinger)

The Court: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don't think it is important.

Q. By Mr. Marcus: When did you first begin to appear in public?

A. When I was eight years old.

Q. Where was that?

A. In the State of Yucatan, Mexico.

Q. Did you continue to appear in public after you were eight years old? A. Yes.

Q. Tell us briefly, when you appeared in public, your experience in connection with trapeze work.

A. Since I was eight years of age I began travelling throughout the Republic of Mexico, Central and South America, and from there I went to Havana, Cuba, and from there to the United States. Every season, when the circus closed, after the summer season, in the United States, I would go with the [6] winter circus all over Europe, and when I got through the winter season I came back and continued with my employment in the United States with Ringling Bros. and Barnum & Bailey.

Q. Did you perform the same act you have described to us, all through your experience? A. Yes.

Q. You continued with that same routine?

A. Yes.

Q. When did you first come to the United States?

A. In 1933.

Q. By whom were you employed at that time?

A. Ringling Bros., Barnum & Bailey.

(Testimony of America Olvera Pollinger)

Q. Did you meet Mr. Pat Valdo at that time?

A. Yes.

Q. From the year 1933 until the year 1936 were you in the employ of Ringling Bros. show?

A. Yes.

Q. From the year 1933 to 1936 you travelled all over the United States with the Ringling Bros. circus?

A. Yes, I did.

Q. Performing the same act? A. Yes.

Q. Were you travelling with the circus on the 24th of September, 1936? A. Yes.

Q. Did you have a conversation at that time with Pat [7] Valdo? A. Yes, I did.

Q. Was he with Ringling Bros. circus at that time?

A. Yes, he was personnel director.

Mr. Combs: We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. circus.

The Court: Isn't that sufficient?

Mr. Marcus: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

Mr. Combs: I don't know that. If you will ask her.

The Court: Let me ask you: In view of the Appellate Court's decision in this matter, is that important?

Mr. Marcus: I don't think so.

Mr. Combs: No.

Mr. Marcus: We offer the contract in evidence at this time.

(Testimony of America Olvera Pollinger)

The Court: Let it be received and marked Plaintiff's Exhibit No. 1.

Mr. Combs: I suggest, if your Honor please, that the contract be read to the jury. It has got to be read sooner or later, or should be.

The Court: It isn't necessary that all of it be read, is it, but the particular parts you wish to have read?

Mr. Combs: I will read them myself. [8]

The Court: You may do so now, or at any other time.

Q. By Mr. Marcus: Miss Olvera, do you remember where this contract was signed?

A. In the State of Texas.

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, in line with the ruling of the Appellate Court.

The Court: I don't see how that can be material.

Mr. Combs: I ask that the answer be stricken.

Mr. Marcus: It may go out.

Q. Did you at that time have a conversation with Pat Valdo? A. Yes.

Q. Relate the conversation to the jury, at the time the contract was executed.

The Court: What is the importance of it, when you have the contract received in evidence?

Mr. Marcus: It has to do with being sent to the Barnes show at that time.

Mr. Combs: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros.

(Testimony of America Olvera Pollinger)

show, to Barnes' show; that she was received there, and employed by that show under the terms of that contract.

Mr. Marcus: Not as an employee of the show.

Mr. Combs: Eliminate that phrase of the stipulation. [9] We will go that far with you. I meant to state that she worked for the Barnes show under the terms of the contract.

The Court: Might it not be agreed that she was an independent contractor?

Mr. Combs: Yes.

Mr. Marcus: So stipulated, your Honor.

Q. What did your apparatus consist of during the year you were employed by Ringling Bros. show, and at the time you went to render your services with the Barnes show?

A. My apparatus consisted of two big main falls. We call the falls, the heavy rope with blocks.

Mr. Marcus: I think at this time we will offer in evidence the apparatus of Miss Olvera, and ask her if it would be possible for her to explain the operation of it by pulling it over there and opening it up.

The Court: You may proceed.

Q. By Mr. Marcus: I show you a bar with two rings on the end of it. Will you explain how this apparatus is connected with the rendition of your act?

A. These two clevises go up like that, which are attached, each one, to a big hook which comes from a big main pole from the big top; then from some clevises come two hooks to each side, which are attached to each side to main guy lines which go to the extreme of the

(Testimony of America Olvera Pollinger)

ring where we perform, and are fastened to iron stakes or wooden stakes, with some ropes to pull a certain way so the main bar would [10] be level also to the bottom bar. The upper bar should be level also to the bottom bar, which is the same width, only with the difference that it has two stars on each side.

Q. Does this bar attach to the roof of the tent?

A. Yes.

Q. Does it go to the top of the tent?

A. Yes.

Q. How high is that from the ground?

A. The top is higher than where this goes. The top may be about 50 or 40 some feet, but the main bar goes from the ground up in the air about 35 feet.

Q. This attaches to ropes that go onto the main poles of the tent? A. Yes.

The Court: Designate that. This will not mean anything in the record.

Mr. Combs: Call this ring the clevis.

Mr. Marcus: Do you want to call it a clevis?

Mr. Combs: That is what it is.

Mr. Marcus: We will call it a clevis then.

Q. Is this the bar that you perform on, Miss Olvera? A. That is the bar.

Q. Is this the bar that you have used during your entire performances? A. Yes.

Q. How long have you used that same bar? [11]

A. All my life, sir.

Q. Does this bar suspend from the other bar by these rods and ropes we have? A. Yes.

(Testimony of America Olvera Pollinger)

Q. When is this bar attached or set up in the tent?

A. That goes up when the big top goes up in the morning; when we arrive in town; it goes with the whole circus equipment.

Q. This goes up when the big top goes up?

A. Yes. We call the big top the biggest one in the show where we perform.

The Court: The largest tent is called the big top?

A. Yes.

Q. By Mr. Marcus: When does the rest of this go up; that is, the main bar that you perform upon?

A. That goes up during the time the show is on.

Q. This bar that you perform upon, do you know when it goes up?

A. During the performance of the show.

Q. Just before you begin your performance?

A. Yes, sir, sometime about then.

Q. What holds this clevis in position?

A. Big hooks from the main top, big iron hooks.

Q. Are there any guy lines or guy ropes that go off of this to the ground?

A. Yes, over this way and over that way. [12]

Q. From each end?

A. Yes, sir, from each end.

Q. What are those fastened to?

A. To iron stakes.

Q. How high from the ground is the bar that you perform upon, Miss Olvera?

The Court: She has already stated.

(Testimony of America Olvera Pollinger)

A Juror: May I ask a question?

The Court: Yes.

A Juror: When you say the bar she performs upon, that is the trapeze bar that has the stars?

Mr. Marcus: That is correct.

Q. How far is that from the ground at the time of your performance, Miss Olvera?

A. At the time of my performance, about 22 feet, because then these lines use the rest of the space up to the tent, about 11 feet.

Q. You mean these lines on the side, from the top to the lower bar?

A. Yes, they would use up the space from the top down to where the other extreme of the trapeze hangs.

A Juror: Is that bar held rigid by these brace wires, or are they movable?

Mr. Marcus: Rigid may be difficult.

The Court: She doesn't understand some terms.

Q. By Mr. Marcus: Does the bar swing back and forth? [13] Does the top bar swing at all?

A. No, it doesn't swing. That stays there steady, fastened by the guy lines.

A Juror: Which is the bar 35 feet? There was a measurement of 35 feet mentioned a while ago.

A. The one which my husband has already guyed up, and that is steady, fastened.

Q. The other is 22 feet? A. Yes.

Q. In other words, the rope is 13 feet long?

A. I don't think it is exactly 13 feet. I am just approximating it. Perhaps 11-1/2 or 12.

(Testimony of America Olvera Pollinger)

Q. By Mr. Marcus: Miss Olvera, how are the lines supposed to be set up, when they are properly set up?

A. Straight, hanging down.

Q. What happens when a line is set up like that?

A. It happens the way it happened to me. That is the way the hook was.

Mr. Combs: I object to that as leading and suggestive.

The Court: It has been answered; but I don't believe your objection is good.

Mr. Combs: I should like to approach the bench for the purpose of making an objection.

The Court: Is it something you feel should be made—

Mr. Combs: I feel that it should be called to the court's attention. [14]

The Court: Not in the presence of the jury?

Mr. Combs: I am inclined to believe that.

I have observed Mr. Marcus and Mr. Pollinger making a studied effort to have the clevis hook overlap, and hook over. I think it is a deliberate attempt to convince the jury that was the way the clevis was. I think his conduct is not only reprehensible, but damaging to the defendants.

The Court: You may proceed. You will have ample opportunity to show how it should be, Mr. Combs. Mr. Marcus is trying to present it from his view of the evidence. He has a right to present his case from his theory, and there is nothing to prevent you from straightening it out at another time.

(Testimony of America Olvera Pollinger)

Mr. Combs: In fact, I don't see why he does it now. He can hook that up at a later time and show how he thinks it was. I have observed him a half a dozen times.

The Court: You can get that all before the jury.

Q. By Mr. Marcus: Does that throw any part of the line out of balance?

Mr. Combs: I object to that as leading and suggestive.

Mr. Marcus: I withdraw it.

The Court: I think it is probably suggestive.

Q. By Mr. Marcus: What effect does an overlapping 8 hook have upon the balance of the trapeze?

A. The balancing of the trapeze, if it is the lower bar, and is perfectly level, it won't make any difference if [15] the hook overlaps like that, if it is perfectly level. The bottom one wouldn't make any difference.

Q. Is there any way of counteracting for this overlapping hook by any guy lines or ropes?

A. I don't understand.

Mr. Combs: I object to that as calling for the conclusion of the witness.

Q. By Mr. Marcus: Is there any way of making the bottom bar level in the event that this 8 hook overlaps, as it does here?

Mr. Combs: I object to that as calling for the conclusion of the witness.

Mr. Marcus: If she knows.

The Court: She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean an

(Testimony of America Olvera Pollinger)

expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?

A. I would like to hear it again.

Q. By Mr. Marcus: In the event this 8 hook is overlapping, as it does, the guy lines that you testified to before, that come off of this clevis to the ground, can they be adjusted or pulled in any way so as to make the bottom bar level?

A. Yes, sir. [16]

Mr. Combs: I object to that as leading and suggestive. He is telling the whole story himself, and asking for a yes or no answer.

The Court: In the case of *People v. Jones*, 160 California, Mr. Combs—if I have that citation correct, and I believe I have—the mere fact that a question calls for a yes or no answer is held not to be leading; but it is important that you do not lead or suggest to the witness, Mr. Marcus. This is a very important phase of the case, apparently. I think you should first show how that 8 hook you refer to should hang ordinarily. I think that should be brought down just as the other one is. Proceed, Mr. Marcus.

Q. By Mr. Marcus: Will you tell us how, when the hook is in the position that it is—

The Court: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

Mr. Marcus: The 8 hook overlaps the ring on the upper bar.

The Court: The top part of the 8 hook?

Mr. Marcus: That is right.

(Testimony of America Olvera Pollinger)

The Court: Turn it around, so the jury may see it. Now proceed with your examination.

Q. By Mr. Marcus: Tell me how the lower bar can remain level when one of the lines overlaps, the way we have indicated here.

Mr. Combs: I object to that as calling for the conclusion [17] of the witness.

The Court: Overruled. You may answer.

A. I know now how it would be, from experience

Q. By Mr. Marcus: Tell us how.

A. When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing any more, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter.

The Court: Do the members of the jury understand the answer?

A Juror: Is there any method of checking before the performance to see that everything is O. K.?

The Court: Is there any objection to that question on behalf of either party?

Mr. Combs: We have no objection to that.

The Court: Answer the question.

A. No, it wouldn't be possible, because it was a little bit over the middle of the season when the accident occurred and the tent is not more white, not now any

(Testimony of America Olvera Pollinger)

more; it is all full of dust and smoke, and it is very dark, and it being the crane bar, it is way into a curve in the tent and is exactly in darkness, and the accident occurred when the sun was almost [18] going down.

The Court: Read the answer please, Mr. Dewing.

(Answer read by the reporter.)

The Court: About what time of the day or night did this accident occur?

A. Pretty near 4:00 o'clock.

The Court: Nearly 4:00 o'clock in the afternoon?

A. Yes.

The Court: Go ahead.

Q. By Mr. Marcus: You reported to San Diego, did you, for the Barnes show? A. Yes.

Mr. Marcus: I presume there will be no objection to the letter going in evidence.

Mr. Combs: No objection.

Mr. Marcus: We offer this letter in evidence at this time.

The Court: What is the purpose?

Mr. Marcus: To show that she was directed to go there, your Honor.

The Court: I don't believe Mr. Combs is making any point on that, are you, Mr. Combs?

Mr. Combs: She was directed to go by Valdo, and reported for the opening of the Barnes show.

The Court: And she was actually performing her act under her contract at the time of the accident? [19]

Mr. Combs: Yes.

(Testimony of America Olvera Pollinger)

The Court: Which occurred in Anthony, Kansas?

Mr. Combs: At nearly 4:00 o'clock in the afternoon of a certain day.

The Court: Yes.

Mr. Marcus: Yes.

Q. By Mr. Marcus: Is this your apparatus?

A. Yes.

The Court: That date was the 11th day of September, 1937, as alleged in the complaint?

Mr. Marcus: That is correct.

Q. Did you have a conversation with a Mr. Cronin, at San Diego?

The Court: What is the purpose of that?

Mr. Marcus: To show that they furnished her with a net.

Q. Did you have a conversation with Mr. Cronin in San Diego? A. Yes.

Q. Was that at the beginning of the 1937 season?

A. That was before we began.

Q. Can you give us the approximate date of that?

A. Yes, sir, it was the 19th of March.

Q. At San Diego? A. Yes.

Q. Who was present at the conversation you had with Mr. Cronin? [20] A. Mr. Thornton.

Q. Who is Mr. Cronin?

A. The Circus manager.

Q. For the Barnes circus?

A. For the Barnes circus.

(Testimony of America Olvera Pollinger)

Q. Relate the conversation you had with him respecting a net.

A. I first introduced myself to him, being after I introduced my own self to Mr. Thornton, the ring director of the show.

Mr. Combs: May I interrupt for an objection? May I approach the bench? We object to the introduction in evidence of any discussion, or evidence concerning the use of a net, upon the ground that the same is not part and parcel of the apparatus referred to in the plaintiff's complaint.

The Court: The objection will be overruled; but I don't see why that sort of an objection should not be made before the jury.

Q. By Mr. Marcus: Relate the conversation you had with Mr. Cronin respecting the net.

A. We started to tell him who was I. He told me, "Yes, Miss Olvera, I got a letter from the Ringling show. They told me they are sending me a feature act on the trapeze," and then he said they told him it was a very good act. I say "You wish to see the act, in a little practice, the same [21] way that I am going to give it in the program during the season?" So I told him I did need a safety net to perform the act. He told me "Did you have one in the big show?" He called it the big show. I told him "Yes, sir, I did have one." He say, "All right, we have a net; we have a net made for you." Then I perform the act without the net. I performed for a little practice, and there would be a big rope attached to that clevis in the middle of the crane bar, tied to my waistline, and two men hold at the other end, on the ground. I

(Testimony of America Olvera Pollinger)

perform practice like that, because I did not have no safety net. When I came down to the ground he told me, "Wonderful. I like your act very much. It is to close the show." When I came down to the ground he told me, "Miss Olvera, there is your net."

Mr. Combs: Is this all part of the conversation?

A. Yes.

Q. By Mr. Marcus: He stated to you "This is your net"?

A. Yes, "There is the net," and I said, "I want to tell you what to do with the net." Then he called Mr. Blackie Williamson, which was the property man, or supervisor, or boss, and he said to tell Mr. Williamson what they are supposed to do with the net, and he will do it for you. So I told him that the net was to keep under my apparatus, underneath, and have a capable man to do so, and watch me constantly, with the hands here in the loops of the net. It is a canvas net with loops around, and men around the canvas, [22] and they hold it, and watch me, and I told him to move wherever I move. Then we began the season. Then my net was there—

Mr. Combs: Are we on the conversation now?

A. Yes, sir.

Q. By Mr. Marcus: You began the season in San Diego? A. Yes.

Q. Did you have a net furnished you, as you stated, by the circus, at San Diego? A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. Did you ever have a net of your own?

A. No.

Q. Was that net given to you by Mr. Cronin, the director of the Barnes show?

A. Yes, that is the show's net.

The Court: You say given—

Mr. Marcus: Furnished, I mean.

The Court: You don't mean that a gift was made of the net?

Mr. Marcus: No.

The Court: Or do you?

Mr. Marcus: I don't, your Honor.

Q. Who held the net?

A. The net men, which the show has got them for that purpose.

Q. Were any of those men ever employed by you? [23]

A. No, sir.

Q. Did you ever pay them? A. No.

Q. Did they appear at each of your performances?

A. Yes.

Q. Over what period of time?

A. From March 20, 1937 to September 11 or 12, 1937, the afternoon performance.

Q. And evening performance?

A. No, sir; just the afternoon performance. That was the last one in my life.

(Testimony of America Olvera Pollinger)

Q. Prior to that time, in Anthony, Kansas, did you perform during the evening on this itinerary from San Diego to Anthony, Kansas? A. Yes.

Q. How many times did you perform?

A. Twice a day.

The Court: Once in the afternoon and once in the evening?

A. Once in the afternoon and once in the evening.

Q. By Mr. Marcus: On each of those occasions where these net men there? A. Yes.

Q. And did they hold the net? A. Yes.

The Court: Mr. Marcus, it is time for our noon recess, which the court is about to take. Mr. Clifton thinks you offered the trapeze and apparatus in evidence, but I don't [24] recall you did.

Mr. Marcus: I did at the time. I don't think there was any ruling. The court hasn't ruled on it.

The Court: It may be received and marked Plaintiff's Exhibit 2. The court will now recess until 2:00 o'clock this afternoon. During this recess the jurors will bear in mind the admonition given by the court heretofore, and return at 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.) [25]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors are all present and in their places.)

AMERICA OLVERA POLLINGER,

recalled.

Direct Examination

resumed.

Q. By Mr. Marcus: Miss Olvera, when you arrived at San Diego, at the beginning of the season, did you have your apparatus with you? A. Yes, sir.

Q. Did it have a lock on it?

A. Yes, it did.

Q. You carried it in this trunk?

A. In this trunk.

The Court: When you speak of a lock on it, do you mean on the apparatus?

Mr. Marcus: No, I mean on the trunk.

Q. What did you do with the key to the trunk?

A. I delivered it to the property man boss.

Q. Who was that? A. Howard Mentz.

Q. What did you do with the apparatus?

A. It was inside the box.

Q. Did you deliver the apparatus too to the property man? [26] A. Yes.

Q. That was Howard Mentz?

A. Howard Mentz, yes.

(Testimony of America Olvera Pollinger)

Q. What connection did he have with the Barnes show?

A. He was supervisor of the property men, working men of the show.

Q. Was he employed by you in any way?

A. No, sir.

Q. You paid him nothing for his services?

A. No, sir.

Q. And he was with the show?

A. He was with the show.

Q. Did you have any actual physical possession of your apparatus at any time after that, after you delivered the box and apparatus to the show at San Diego?

A. No, sir.

Mr. Marcus: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. The answer may stand. What is the answer, Mr. Dewing?

(Answer read by the reporter.)

Q. By Mr. Marcus: I believe you testified this morning that you had a conversation with Mr. Cronin with reference to a net.

A. Yes, sir.

Q. And on your itinerary from San Diego until you [27] reached Anthony, Kansas, this net was furnished you in the performance of your act, is that correct?

A. Yes.

Q. How many men held the net?

A. Eight or ten, as far as I can remember.

(Testimony of America Olvera Pollinger)

Q. Will you describe how large the net was?—or did I ask that question, your Honor?

The Court: I think not.

Q. By Mr. Marcus: Will you describe how large the net was?

Mr. Combs: I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated, without having to make it each time, after each question.

The Court: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

Mr. Marcus: Yes.

Q. Will you ask the question again, Mr. Reporter?

(Question read by the reporter.)

A. The net was about 10 x 10 feet square.

Q. These men, you say, held the net?

A. Yes, they did.

Q. Explain to the jury how the net was held.

A. The net was held by some loops, which are attached to the very net, and the net men put the loops through their hands, and then a rope overlaps, and they reach, and it goes [28] through the palm of their hand, and they catch it like that. The net is held with the two elbows on the waistline, so in case the performer loses control, when they fall the elasticity of the arms will give a little, and then the performer has a safer place to fall. I don't know how to explain it.

Q. On each occasion of your performances, twice a day, this net was there in the ring, is that correct?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. What ring did you do your performance in?

A. In the center ring.

Q. In the center ring? A. The middle ring.

Q. There were two other rings, on each side?

A. Yes. I was the leader of the aerial act.

Q. Do you know whether or not this net was used in any other performance in the circus?

A. In the Barnes show it wasn't, but in the Ringling show it was used by other actors. The net belonged to the show.

Q. You never brought this net? A. No, sir.

Mr. Combs: I object as leading and suggestive.

The Court: The questions are leading.

Q. By Mr. Marcus: Did that net belong to you?

A. No, sir.

Q. Did you pay any of these men for holding the net? [29] A. No, sir.

The Court: I think you asked that question. It is my recollection that you have. Possibly it will take less time to hear the answer than to look up the record.

Mr. Combs: I think it was asked twice before.

The Court: And answered, too?

Mr. Combs: Yes.

Q. By Mr. Marcus: Miss Olvera, will you please explain to the jury how you established your position on the bar that you performed upon, so that you could balance yourself when you are performing your act?

A. I have got to explain from the beginning.

(Testimony of America Olvera Pollinger)

Q. I want you to do that.

The Court: Maybe she does not understand the word "establish."

A. I really don't.

Q. By Mr. Marcus: You don't understand the word "establish"? A. No.

Q. How do you place yourself?

The Court: She has used the word "balance."

Q. By Mr. Marcus: How do you balance yourself? Do you understand the question? A. Yes.

Q. Answer it, please.

A. I balance myself in whichever position I pose my [30] body, with the two hands in front, if I am frontwise, and to steady I look at one point, which we call in the performance ring the point of view; but I don't do it very low; not very high, but this way, naturally. I am performing just with my feet, my legs and my arms, whatever I have to do to hold the balance. I never take my eyes from there, because I would get out of control. My body will go like this, and when I swing I place my point of view; when I swing far, there is one place I look, at the top, steady. That is the only steady point I have, because if I look at the ground the ground won't be moving, but I would be moving, and I would lose my point of view.

Q. In order to balance yourself there must be an established point of view? A. Yes.

Q. During all of this act?

A. Yes, during each one of the exercises I might be doing.

(Testimony of America Olvera Pollinger)

Q. When you arrived in Anthony, Kansas, do you remember what time of the day your performance started, on the 12th of September?

A. My performance started around 4:00 o'clock, because we arrived late that day in Anthony, Kansas.

Q. Tell us how you started your act.

A. The beginning of my act in the Ringling show, which was the very same lapse of time, which I used when they sent [31] me to the other show, the Barnes, was the duration of three minutes, the first part of the act, and two minutes approaching the second part. The first part did consist of three acts. At the same time two other ladies in the other rings and me in the center, as the feature. I did have shorter—the Ringling show requires shorter acts than I used to do it. I used to come into the ring with the Spanish costume, with a cape, and I did some steps, like dancing, with my cape, and then the property man came and took my cape. Then I went into the middle ring, and they have got the rope there for me to go up, and they pull me up; then I reach like that, and I go up, with my feet between, and my two arms, and I put my knees on the bar, and I swing out and catch two little bars, and open my hands—

The Court: As she is testifying you haven't indicated what it is in the record, and it won't be of any effect so far as the record is concerned.

Mr. Marcus: When you indicate, explain what you are indicating.

The Court: I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language.

(Testimony of America Olvera Pollinger)

Mr. Marcus: You proceed, and I will explain for the record.

The Court: Go ahead, Miss Olvera.

A. Right at that time the three acts begin at the same [32] moment. I lift my hands off the lines of the trapeze; I put them to the front, as I am sitting in the very bar.

Q. By Mr. Marcus: Indicating—

A. With my hands forward; I put my hands in front first, in the bar, with the hands here—

The Court: The hands upward, extending in front of the body.

A. Yes. Then I put my left foot in the same position, going up, and never touch the lines. Then with the oscillation of my body I begin swinging the bar one way, slightly sideways, while my body is still in front, with the oscillation of the body. Then when the swing is lively, then I turn sideways, with the line in the direction of my nose. Then I fix my point of view right on that line, on that wire. Then I open my hands. I do this. Then I revive that swing again, with the oscillation of the legs, and then I take one of the legs out and put it here, also with two hands, then I place this foot back on the trapeze and turn with some oscillation of the body. I steady the trapeze again, not to move. Then I take a bow. Then from there I go around, turn. I stay like this—

Q. By Mr. Marcus: Indicating the two legs on the bar frontwise.

A. The lines of the trapeze go by my side of the body.

(Testimony of America Olvera Pollinger)

Q. The right side of the body?

A. Both sides. Then my two feet are standing like that. [33] Then my body turns around but not my legs. My feet never move. My legs get twisted from this other side. Then I do the exercise again on the same position that I did it on the other side. Then from there I kneel down and take one knee out of the trapeze, and put one hand on that one knee, which is the left knee, the right hand. Then I raise the right leg way up with one hand, and then I pick up a silk handkerchief with my mouth. Then I place back the knee. I do the exercise with the trapeze steady. I pick up the handkerchief between my knees, and with two hands crosswise, like that in back of my body. Then I bow; put up my right leg again; put my left; stand up, and take a bow, without touching the lines of the trapeze. Then from there, with the oscillation of my body, I swing in an oscillatory way.

Q. Indicating a circular motion?

A. Yes. Then I pull with the swing, with my legs on the trapeze. I never touch the lines. The lines twist one against the other until they get in back of my body, way down below my waistline. Then from there I take one leg out, placing the hands out, and wait in that position until the trapeze itself untwists to the original position in front, and when it gives a nice swing out. Then I take a bow, and with the oscillation of my body I steady the trapeze again. From there I sit down; take a bow. Then my husband comes in front, and with the line, which is hanging on the right side of the crane bar, he pulls me twice, and I go with this leg [34]

(Testimony of America Olvera Pollinger)

twisted, like this, with the toe of the foot. Then he pulls me one or two times; then I go out. I revive the swing with my two hands, sitting like the little kids do in school with the swing. Then I lift my hands on the lines, sitting in the very same position, and put my hands like this.

Q. Extending in front?

A. Yes, extending in front, and when the swing goes—before I reach the end of the swing, because the swing has to end and come back, when that swing finishes it goes up and back, the trapeze don't wait at all. Then it comes back, and then when it gets the time to swing out, I put my right foot in the trapeze in this condition, and then I will lose my point of view on the ground, and I will then see the crane bar, which is the only thing that don't move. I do this; kick my right foot, and go up. That is the last thing I did the day of the accident.

Q. What did you see when you looked up?

A. I saw the hook overlap.

Q. Was that the position it was approximately in when you saw it that day, which we heard of this morning, overlapping?

A. Exactly.

Q. Then what happened?

A. The hook overlapped.

Q. When you swung out, what happened?

A. When I put one leg to go out, I saw the hook over- [35] lapping, and the very moment I saw it it came loose, and threw me over to one side. I tried to save myself.

(Testimony of America Olvera Pollinger)

Q. What did you do in order to save yourself?

A. I know how to fall, and I place myself to fall in the net.

Q. How did you do that?

A. I went out this way, with my head down, because I tried to reach with my hand this line to catch me, this arm. The slack of the hook wouldn't let me catch the line, and I went this way. So, knowing there was a net, I make myself in a group and I catch my knees and my hands, like that, the way we learned to fall into the net, and tried to pull myself like for a somersault, and not hit with my head in the net. I hit with my back in the ground; not in the net.

Q. When you came out to perform your act on this day in Anthony, Kansas, and on all previous occasions on your itinerary, did your act start immediately as you came out into the ring? A. Yes.

Q. Did you have a band with the circus?

A. Yes.

Q. Were they playing music at the time you came out?

A. Yes.

Mr. Combs: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct. [36]

The Court: The court will admonish counsel to avoid leading questions.

Q. By Mr. Marcus: Tell us what the band was doing, Miss Olvera, when you came out to perform.

A. It was playing a Spanish piece for me to go into the ring.

(Testimony of America Olvera Pollinger)

Q. Where did you come from when you entered the ring, what place?

A. By the main entrance, right by the band music place.

Q. Did you have a performer's tent where you dressed and came to before you entered the main tent?

A. Yes, sir, I had a private dressing room.

Q. Did you have any special music that was played for you when you entered? A. Yes, always.

Mr. Combs: May I suggest again that these are leading and suggestive questions. I don't know how to stop him, your Honor.

The Court: Mr. Marcus, I wish you would bear in mind the court's admonition. However, this seems to be preliminary.

Mr. Combs: I don't care about it unless it gets up to the point where it is critical.

The Court: A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them.

Q. By Mr. Marcus: Please tell the jury when your act [37] began what was done in connection with your act?

A. I first danced some Spanish steps with the music.

Q. Where does this dance take place?

A. In the middle ring; two or three little steps. Then I go out; then the music changes to something sweeter, and then I keep on going until it stops, because they announce me through the loud speaker; when the

(Testimony of America Olvera Pollinger)

other ladies come down, they be all around in the middle circus, and they announce me, and there is no music after that until I finish the act.

Q. Are you in a continuous performance from the time you went into the ring until your act is completed?

Mr. Combs: I object to that as calling for the conclusion of the witness. The witness may state what she does, but not her conclusion.

The Court: Sustained.

Q. By Mr. Marcus: Miss Olvera, is there at any time during your performance, from the time that you come into the tent until your act is concluded when you do nothing?

Mr. Combs: I object to that as leading and suggestive.

The Court: Overruled. You may answer.

A. I really don't understand.

The Court: I think she has explained very thoroughly what constitutes her act.

Mr. Marcus: Very well. I will withdraw the question.

Q. Miss Olvera, this trapeze that is marked in evidence, [38] when was that trapeze brought into position, so far as the performance of your act is concerned?

A. I never knew when it was brought into the ring.

Q. When was it placed in position, so far as your act was concerned?

A. Very, very shortly before my act takes place. I never knew, because I have nothing to do with that.

(Testimony of America Olvera Pollinger)

Q. Was it in position, that is to say, the same position that you performed on it during the rendition of the previous acts that are given in the ring?

A. What?

Q. During those acts that are given before you go up to act.

A. Is it up?

Q. Is it up in position?

A. Yes, it is.

Q. But is it during all of the performances of the other acts before you?

A. No, sir, because some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I don't have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I don't have nothing to do with it," as a conclusion of the witness.

The Court: Denied. [39]

Q. By Mr. Marcus: Who brings your rigging into position, so that you can perform upon it?

A. The rigging men.

Q. Do you know who they are?

A. Very few of them. They was not steady; only three or four steady. The others one did last one week or a week and a half or two weeks sometimes so I can't say who are the rigging men.

Q. Did you employ any of the rigging men?

A. No, sir, I never did.

Q. Do you know who employed them?

A. The circus.

(Testimony of America Olvera Pollinger)

Q. When you fell, what happened?

A. As I was saying, I missed the net to my misfortune.

The Court: Read the answer, Mr. Dewing.

(Answer read by the reporter.)

Q. By Mr. Marcus: Did you see the net as you started to fall? A. I didn't see it.

Q. Do you know of your own knowledge whether or not this net moved at any time?

A. No, sir, it was not moved at all. I struck one of the men on the shoulder when I came down.

Mr. Combs: If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the [40] damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel's questions are leading and suggestive.

The Court: You may make your motion to strike out, if you think you would like to have the court consider it.

Mr. Combs: I don't want to hamper the speed, of course, of this trial, but I have to combat with this persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can't anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

The Court: Would you read Mr. Combs' statement?

(Statement read by the reporter.)

The Court: Proceed.

(Testimony of America Olvera Pollinger)

Q. My Mr. Marcus: Miss Olvera, your husband was employed in the circus, was he? A. Yes, sir.

Mr. Combs: There is another leading question, which you get immediately.

Mr. Marcus: It is just preliminary, your Honor. I did not intend to do that.

Q. Was your husband employed by this circus?

A. Yes, sir.

Q. How long,—from what period of time had he been so engaged?

A. Since 1934. He was employed by the Ringling show. [41]

Q. Did he accompany you to San Diego?

A. Yes, with his act.

Q. Did you know that he was engaged during that same period that you were? A. Yes, sir.

Q. Was he in the ring at the time?

A. Yes, he was.

Q. Tell us when he entered the ring, of your knowledge.

A. He entered the ring with me. Always he did have already his costume to perform his act.

Q. When did his act go on?

A. I finished my act, and then there was some horses running around the tracks. Right after the horses go, my husband's act.

Q. What did he do in connection with your act?

A. He has an apparatus which is a symbol of the Eiffel Tower.

Mr. Combs: I object, your Honor, as being non-responsive. That was his act. The question was your act.

(Testimony of America Olvera Pollinger)

The Court: It may go out.

Q. By Mr. Marcus: What did he do in connection with your act?

A. In connection with my act he didn't do nothing.

Q. You say he was in the ring there at the time?

A. Yes.

Q. He went in the ring with you? [42]

A. Yes.

Q. What did he do when he was there?

A. He just help me to go up.

Q. You testified before that he pulled your line?

A. Yes, he pulled me up. He helped the prop man, and then he pulled me. He gave me the swing. That was all he did.

Q. That was what he did? A. Yes.

Q. You say that you missed the net, and fell to the ground? A. Yes, I did.

Q. Were you unconscious at any time?

A. No, I was not.

Q. Who was present in the ring at the time that you fell?

A. All the net men, my husband, the ring director, and some of the ring men, which I wouldn't be able to name them, because when I was falling down the only thing I saw was the net. I didn't see them.

Q. Did you make any statement at the time?

A. Yes, I did.

Q. In the presence of the ring men?

A. In the presence of everybody.

(Testimony of America Olvera Pollinger)

Q. What did you say?

Mr. Combs: I object to that as a self-serving declaration, incompetent, irrelevant and immaterial. [43]

Mr. Marcus: It is part of the *res gestae*, your Honor.

Mr. Combs: It is entirely self-serving.

The Court: You will have to lay the foundation more definitely, Mr. Marcus. How shortly after the fall?

Q. By Mr. Marcus: How soon after the time that you fell did you make a statement?

A. The very moment my husband came to pick me up.

Q. How long was that after you fell?

A. I hardly hit the ground. He ran to me to pick me up. I was looking at the trapeze. It was swinging just one end, like that. I saw I was too low on one side. He picked me up and tried to run with me. This arm was broken—

Mr. Combs: The whole answer is non-responsive; it does not relate at all to the question which was: What was said? The vice is that I have been given no opportunity to object to any of it, and I would ask that the entire answer be stricken so far.

Mr. Marcus: I submit that is an explanation, establishing the time when she made the statement.

The Court: Motion denied.

Mr. Marcus: Proceed.

A. Then he held myself like that, and I told my husband "Look, the trapeze dropped me down. God knows," I say, "look at the trapeze." He was only interested to take me out.

(Testimony of America Olvera Pollinger)

The Court: That part may go out as a conclusion. [44]

Q. By Mr. Marcus: Did you see the trapeze from where you were? A. Yes.

Q. What was the condition of the trapeze at that time? A. It was lower on one side.

Q. How much lower?

A. Three and a half to four inches.

Q. Miss Olvera, will you tell us what injuries you sustained at the time?

A. I sustained—I got that time a broken arm. This arm, the bone was out.

Q. Indicating the right arm? A. Yes, and I broke my right heel to my foot; my pelvis and my vertebrae to my vertebral column, my spinal vertebra. I figure, so far I know three are fractured, and two of them are—the body of the vertebrae have a crack, and they are inside of each other.

Q. Did you suffer any internal injuries at the time?

A. Yes, I did, but I won't be able to tell the jury.

Q. Can you have any children now? A. No.

Q. Where were you taken after this accident?

A. To the hospital.

Q. Was that in Anthony, Kansas? A. Yes.

Q. How long did you remain in the hospital in Anthony, [45] Kansas?

A. A week. Maybe five days or six days; something like that.

Q. Where did you go from there?

A. I went on a stretcher to the Pullman car. They took me from there—we joined the circus at Amarillo,

(Testimony of America Olvera Pollinger)

Texas. I went in the Pullman car of my own train, with three boards, one on the bottom of my body, and one here and one here.

Q. Indicating the right side:

A. With hinges. They opened them in the night so the movement of the train would not shake me. My husband used to hook me like that, like boxes they make for dead people, the same way, so my body won't be shaken. In the morning he would take me out, and let me rest, because the train was not moving then. I remained with the show until the show closed, in the Pullman car.

Q. How long was that?

A. The show closed in November.

Q. What did you do in November, after the show closed?

A. I came to Baldwin Park.

Q. You came to California?

A. Yes.

Q. Baldwin Park is here?

A. Baldwin Park is in California, the circus winter quarters [46]

Q. What did you do there?

A. I stayed in the train until my husband went and looked for an apartment; then he took me to the apartment, and I stayed there until already the season was going to open again, and I stayed in that apartment.

Q. Since you were injured, in the year 1937, Miss Olvera, have you ever performed your act on the trapeze again?

A. No, sir, I never did. I tried to practice.

(Testimony of America Olvera Pollinger)

Q. Where did you try to practice?

A. One time, because I would give anything for that. I went and practiced. I wanted to go on again

Q. When did you practice?

A. Shortly before the season was opened. I did have so much confidence in my balance I said "Even if my leg don't feel good" I went up and tried the balance. I put a line around my waistline for safety, and they pull me up, and when I touched the trapeze I screamed very badly, because it hurt so much my spine and arm. I couldn't do it.

Q. Was that the only time you attempted to practice?

A. Yes, that was the only time I tried.

Q. Since 1937 have you earned any money whatsoever?

A. No, sir.

Q. Have you suffered much pain during the last seven years?

A. Constantly I do.

Q. Over what period of time was it that you were in bed? [47]

A. A very long time. I really don't remember.

Q. You don't remember the exact time?

A. No. As a matter of fact, some days I still remain in bed.

Q. Do you use crutches now?

A. Yes, sir.

Q. For what period of time have you used those crutches?

A. Ever since I have tried to walk, after the accident.

(Testimony of America Olvera Pollinger)

Q. What is the condition of your legs at the present time?

A. My right leg is half numb; parts of the leg are numb, and is shorter, and some days very big, swollen. Some days it is pain, very pain, then a big swelling again, and so on.

Q. Do you suffer any pains in your legs?

A. No, not now. My leg don't feel well. My feet don't feel well.

Q. Where do you suffer with pain?

A. In my spine.

Q. Do you suffer with pain in your arms?

A. Just when it is cold; cold weather.

Q. Have you earned any money? A. No, sir.

Q. Since you had your accident? A. No, sir.

Q. Did you ever have a conversation with Pat Valdo [48] after this accident? A. Yes, I did.

Q. Where did this conversation take place?

A. In Ringling circus.

Q. Where? A. At Houston, Texas.

Q. Did you see Pat Valdo in the Barnes show on the date that your accident happened?

A. Yes, sir, I did.

Q. Did you at that time have a conversation with him? A. Yes, I did.

Q. Did you have a conversation with him after your accident? A. Yes, I did.

Q. Where did this conversation take place?

A. At the hospital.

(Testimony of America Olvera Pollinger)

Q. Will you relate the conversation, please?

Mr. Combs: Who was present?

Q. By Mr. Marcus: Who was present at the time that you had this conversation?

A. At the time with my husband and a wire walker, by the name of Billy Moralis, and a nurse, and I believe Mrs. Briton, I am not sure. I was a little bit sleepy from the ether they gave me.

Q. Do you remember the conversation?

A. Yes, I do. [49]

Q. Will you relate the conversation, please?

A. He spoke to me first, and he told me, "America, I am sorry that anything happened to you again." I don't know if I should say again, because—

Q. Go ahead; just tell what was said, what he said.

A. He said, "I am sorry, America, that has happened to you again, because there someone got the wrong rope, and make you fall down, and you have an accident in New York." He says, "Look what has happened to you." I said, "Yes, Mr. Valdo, isn't it awful?" I was feeling very bad. I cried. He said, "Don't feel bad, America. We will never let you alone." I said, "Please, Mr. Valdo, don't leave me alone. I haven't got money." I reminded him I have got my mother and three sisters to support. He told me "America, yes, I know. You are a good girl." He patted my shoulder and said "God bless you. You have got to go back to the show. Whatever you may need, whatever you want, just let me know, and you will have it." That was the conversation.

(Testimony of America Olvera Pollinger)

Q. Has the Barnes and Ringling shows ever paid you anything, under this contract, since the date of your accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not proper direct examination; not proper within the issues of this case.

Mr. Marcus: She travelled with the circus afterward. I am trying to determine whether they have paid her for [50] travelling with them.

The Court: Objection overruled. You may answer.

A. No, sir. I went and asked once for my salary.

Q. By Mr. Marcus: Of whom?

A. Mr. Cronin, the manager of the Barnes circus. He told me I wasn't entitled to any salary. He told me "Miss Olvera, if you want any salary you have got to fight for it." I told him "I don't want to fight for it."

Q. They did not pay you anything? A. No.

Mr. Marcus: Cross examine.

Cross Examination

Q. By Mr. Combs: When you had the conversation with Pat Valdo your husband was still performing with the Barnes show, wasn't he?

A. My husband was with me in the hospital.

Q. Answer the question: Wasn't he performing?

A. No, sir.

Q. Wasn't he performing the week preceding that?

A. No.

Q. Do you mean they let him out too?

A. Yes; but I can explain. May I?

(Testimony of America Olvera Pollinger)

Q. Yes, do.

A. My husband couldn't perform after my accident occurred because I was his partner in the work. How could he perform? [51]

Q. You were his partner in the Eiffel Tower act?

A. Yes, sir.

Q. What did you do in the Eiffel Tower act?

A. I performed there on top of the Eiffel Tower, which he did hold on his shoulder with other boys.

Q. You say he did not perform at all with the circus after you were injured, is that right?

A. He did perform after three or four weeks, after the other trapeze artist, one of the other ones over there who used to work with me, practiced and learned a little part of what I used to do with him. That was Mrs. Cristiani.

Q. During all that time your husband received his salary as a performer? A. No, sir, he did not.

Q. Did he at all times perform?

A. After he performed, yes, but not when he lay off, because I was injured.

Q. When you were injured at Anthony, Kansas, you were seeking reemployment, or re-performance in the Ringling show, as distinguished from the Barnes, weren't you?

Mr. Marcus: I object to the question as compound.

The Court: Read the question, please, Mr. Dewing.

(Question read by the reporter.)

(Testimony of America Olvera Pollinger)

Mr. Combs: I think that is a compound question. I will withdraw it, and ask you again:

Q. At the time that the accident occurred, in Anthony, [52] Kansas, you were requesting of the Ringling show that you be returned as a performer in that show, weren't you?

Mr. Marcus: I object to that as calling for the conclusion of the witness.

The Court: Objection overruled.

A. Can I answer?

The Court: Yes, you may answer.

A. You asked me, sir, if I did ask the show to re-employ me?

Q. By Mr. Combs: Send you back to the Ringling show, isn't that right? A. In Anthony, Kansas?

Q. Prior to that time, and at that time.

A. I don't think I would be able to do that, positively not, with a broken spine.

Q. This was before the accident, Miss Olvera; please tell us if you were then seeking to get back as a performer in the Ringling show.

A. Before the accident?

Q. Yes. A. Just before the accident?

Q. The week before.

A. I never did, because I was working for the Ringling show, with one of their own shows, I was sent by them.

Q. You know that the Ringling show had one show, or performance, and the Al Barnes show had another, don't you? [53] A. That's true.

(Testimony of America Olvera Pollinger)

Q. You wanted to perform in the Ringling show, as distinguished from the Barnes, didn't you?

A. Not while I was already in the Barnes. I did not want to go over there, because I did not like the idea, but I was sent there, and they told me not to worry, because that was the same circus.

The Court: I don't think that is clear; you had better explain that. You said you did not want to go there, and they sent you somewhere else?

A. I did not want to go to the Al G. Barnes show.

Q. By Mr. Combs: You wanted to stay with the Ringling show, and perform in the Ringling show?

A. Yes.

Q. That was because the Ringling show was the No. 1 show? A. Not exactly for that.

Q. You kept repeatedly asking Mr. Valdo to return you to the Ringling show, after March, and up to September, 1937, didn't you? A. No.

Q. Didn't you ever write him and ask him to do that?

A. From the Al G. Barnes show?

Q. Yes. A. No, I never did.

Q. Didn't you ask him, on the day he came over, to see [54] your act, and see how well you were performing it? A. I never did act—

The Court: Finish your question.

Q. By Mr. Combs: Didn't you ask Mr. Valdo, when he came over to Anthony, Kansas that day from the Ringling show, which was nearby, to take a look at your act to see if he wouldn't return you back to the Ringling show? A. Why should he look at my act?

(Testimony of America Olvera Pollinger)

The Court: No, answer the question.

A. I did not ask him.

Q. By Mr. Combs: You did not ask him?

A. No, I did not.

Q. Isn't it true that Mr. Valdo came over to the Barnes show on that day for the sole purpose of seeing how well your act was going?

Mr. Marcus: I object to that as calling for the witness' conclusion.

Mr. Combs: I will withdraw the question. It does call for a conclusion.

Q. Didn't Mr. Valdo tell you, when he arrived on that day at Anthony, Kansas, that he came over for the sole purpose of observing your act, to see if you were good enough to go back to the Ringling show?

A. If I say yes or no, may I explain?

Q. Yes, you may. A. No. [55]

Q. Explain, please.

A. I was in the Ringling show before that, and my act could never be better than it was. I performed it with perfection. I did not learn the act in the Ringling show. I was already finished perfectly when I go there.

Q. But didn't you prefer to perform in the Ringling show, rather than the Barnes show, at that time?

A. At that time, no, sir; I was already there.

Q. You would just as soon perform then for the Barnes show as the Ringling show? I am not trying to infer that the Barnes was a different entity than Ring-

(Testimony of America Olvera Pollinger)

ling; I am asking you if you did not prefer to perform in the Ringling show at that time.

A. I would prefer to, yes.

Q. Valdo came over that day to see you perform, with a view to the possibility of your going back to the Ringling show? A. No.

Q. You did not communicate with him, and ask him to come over for that purpose?

A. During the season of the Barnes? No, sir.

Q. Didn't you write him, or communicate with him, and tell him you were not getting the right kind of service with the Barnes show, and you wanted to go back to Ringling?

Mr. Marcus: I object to that as not being the best evidence. Do you have such letter, counsel? [56]

Mr. Combs: Do you?

Mr. Marcus: I am not required to answer your question. I object to it upon the ground that it is not the best evidence.

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

The Court: Overruled. You may answer.

A. No, sir.

Q. By Mr. Combs: Did you communicate with Mr. Cronin, the manager of the Barnes show, to that effect?

A. Yes, I communicated, but not to send me to Ringling show. I beg him, very many, many occasions to look after the property mens, and to give me a competent man to do so.

(Testimony of America Olvera Pollinger)

Q. I presume that's why you had your husband assist you in your act, isn't it? A. No.

Mr. Marcus: That is objected to upon the ground that what counsel presumes is not evidence.

The Court: Sustained.

Q. By Mr. Combs: Was that why you had your husband participate in your act? A. No.

Mr. Marcus: I object to that as calling for the witness' conclusion.

The Court: It has been answered.

Q. By Mr. Combs: Why did you have your husband take part [57] in operating your act?

Mr. Marcus: That is assuming he took part in operating her act.

Mr. Combs: The evidence shows he pulled the rope on the giant swing from which she fell, and likewise he raised her up when she went into her act.

The Court: It assumes she had him do it.

Mr. Combs: I will reframe it.

Q. Did your husband pull the rope when you raised up to your trapeze, and likewise on your giant swing?

A. Yes.

Q. At your request? Your answer is yes?

A. Could I explain?

The Court: Yes, you may explain. Answer yes or no. A. Yes.

The Court: Then you may explain.

A. Because there was nobody else there to do it. The mens who used to do it, sometimes, once they took me

(Testimony of America Olvera Pollinger)

out hanging on the line, out of the trapeze, and one of the men, he fell down; they did not know what to do; none of them.

Q. So, I take it, you had your husband do that because you preferred his manner of doing it to anyone else's, isn't that right? A. Yes.

Q. He had been doing that all the time you were performing with the Barnes show, hadn't he? [58]

A. Yes.

Q. From March to September? A. Yes.

Q. Then, I take it no one else ever did that for you on the Barnes show, is that right?

A. Yes, they did for me.

Q. Who else, Howard Mentz? A. Yes.

Q. I take it they did it only occasionally, is that right?

A. Yes.

Q. Your husband most of the time? A. Yes.

Q. That was at your insistence and request, wasn't it? A. Yes.

Q. Your husband got into the ring before you did, in your act, didn't he? A. No.

Q. About what time? About simultaneously with you—about the same time?

A. The very instant; we both stepped into the ring together.

Q. I take it he went direct to the rope and pulled you up, and you took the other end of the rope and up you went, is that right? A. Immediately, yes. [59]

(Testimony of America Olvera Pollinger)

Q. Then he stood, I take it, and held that end of the rope he had hold of, and pulled it over out of the way of the swing of your trapeze? A. Yes.

Q. The top of that rope was attached to the crane bar? A. It was.

Q. Was that attached to the clevis on the crane bar? A. No.

Q. Whereabouts on the crane bar? A. That is one of them.

Q. One of which? A. Them.

Q. This (indicating)? A. No.

Q. This? A. No, in between.

Q. Right in there?

A. There is a long steel cable attached to that which is around in the courtroom somewhere, with a big bunch of wire—I don't know if it is the proper word to say bunch.

Q. Cable; that's right.

A. Steel cable, about a yard, from that bar in between the clevis and the No. 8, from the extreme end of that yard of steel cable was a pulley with a rope, pulled me up.

Q. This cable ran down here about a yard?

A. Yes. [60]

Q. Alongside of this fall? A. Yes.

Q. This is a fall, is it not?

A. That is a fall line.

Q. It hung from this worn part of the crane bar between the eye hook and the clasp? A. Yes.

(Testimony of America Olvera Pollinger)

Q. At the end of that was a pulley through which the rope upon which you ascended on the trapeze ran?

A. Where it ran?

Q. Ran through the pulley? A. Yes.

Q. The other end of that rope ran out where your husband was?

A. No, there was a rope completely around.

Q. So when you were up on the bar your husband pulled the whole thing off to the side so it wouldn't interfere with the movement of your trapeze, is that right?

A. Yes, he walked out of the ring. He did not have to pull it; just have it in his hand and walked out. The whole thing would go with him.

Q. Then when you were ready for a little lift to start the big swing, he ran right over so that he could get hold of it, and give you two pulls? A. Yes.

Q. Then you started that big swing? [61]

A. Yes.

Q. In the center of this crane bar I observe an eye hook. A. Yes.

Q. What is the purpose of that?

A. For the purpose of the safety line.

Q. There was a safety line attached to this?

A. Yes.

Q. Is that the line you referred to, when you stated you practiced with a safety line? A. Yes.

Q. There was another type of safety line used on this trapeze when you were with the Ringling show?

A. Yes, there was one more.

(Testimony of America Olvera Pollinger)

Q. Wasn't that an invisible wire?

A. That was an invisible wire, yes.

Q. Which attached to this thing, and to your body, about your waist?

A. Yes.

Q. So that was a protection you had in the event you fell?

A. Yes.

Q. Instead of the net, when you were with the Ringling show?

A. Yes.

Q. But when you went to the Barnes show, I take it, you [62] did not use that?

A. Yes, I would say yes, but may I explain?

Q. Yes.

A. When I came to the Ringling show, as I never carry a net around, because it is too heavy for me, to carry around—I used to travel around then; I travelled from South America to Cuba; from Cuba I came to the United States, and it would be too much for me to carry. And then, as it was customary, we did not have to even ask the show to give us a net, provide us with a net, and there wasn't any purpose for me having a net.

Q. Is that your answer to that question?

A. I am explaining, sir.

Q. That little wire was too heavy to carry around?

A. No, sir, it wasn't the wire.

Q. And as was customary—

The Court: She said the net was too heavy.

Mr. Combs: That was just the point; my question was: What did you do with the invisible wire.

A. Now I tell you what I did with the wire?

(Testimony of America Olvera Pollinger)

Q. Yes.

A. If I mention the wire, I have to keep on.

Q. Just about the wire; then we will get to the net later.

A. All right. The wire was for the purpose in case I would lose control and I may fall— [63]

Q. Beg pardon, Mrs. Pollinger; that is not responsive to my question. I want you to tell me what happened to the invisible wire that you had used on the Ringling show, when you came to the Barnes show.

A. Mr. Valdo told me—he talk it over with me—I will answer the way you want me.—Mr. Valdo told me take that off my body because the circus preferred to have the net for me instead of that wire.

Q. But you did not talk to Valdo when you were on the Barnes show, did you?

A. No, that was the Ringling show, the very first year, at Madison Square Garden.

Q. You took the invisible wire off the year before?

A. No, sir, not the year before.

Q. Several years before?

A. The very same year I came to Ringling Bros., Barnum & Bailey I slipped once, because there was some dirt from the horses was sticking to my shoe. You know that, Mr. Combs; I told you before, I slipped down on the trapeze. Well, I was protected by the line. Then Mr. Valdo used to watch my act very closely. He came to me and says "America, did you have a safety line on you which nobody could see?" I told him "Must I tell you?" He says yes. I told him "If you must

(Testimony of America Olvera Pollinger)

know, I have one." He says "Why do you do that?" I say "To protect myself. I am too high." He say "My dear girl, why don't you use a net. That's better; with a net it is much [64] better."

Q. All this, I take it, occurred in the Ringling show, in 1933? A. Yes, the very same year.

Q. Let us confine ourselves to the years from 1937 or 1936. Let us confine ourselves to that time. At that time did you have a net when you performed with the Ringling show, in 1936? A. Yes.

Q. Didn't you perform then without a net, on the Ringling show?

A. Never; after I took the safety line, the show gave me a net.

Q. When you went to the Barnes show you described to Mr. Cronin the sort of net you wanted?

A. I did not describe it to him.

Q. What did you say to him about it?

A. I needed a net.

Q. Just a net? A. Yes.

Q. Any kind which he would furnish you with, is that it? A. Any kind the circus have.

Q. The net they did furnish you was a satisfactory net to you, is that right? A. Yes.

Q. Did you tell Mr. Cronin how that net was to be [65] handled; where it was to be put?

A. Not to Mr. Cronin.

Q. Who did you tell that to?

A. Mr. Blackie Williams.

(Testimony of America Olvera Pollinger)

Q. You told him where to hold the net, is that right?

A. Yes, sir.

Q. Where did you tell him to hold it?

A. Under my trapeze, beneath me.

Q. And at all times? A. And at all times.

Q. Directly under the center of your trapeze?

A. And to move with me and watch me; keep constantly the eyes on me.

Q. You knew there were eight or ten men holding the net, didn't you?

A. Yes. I saw them. I did not know positively eight or ten.

Q. There were at least eight? A. Or ten.

Q. You say that you had these men move with you as you swung in the trapeze?

Mr. Marcus: She stated she told them to do that.

Q. By Mr. Combs: Did you tell these men, or tell their boss, Blackie Williams, to move as your swings progressed, move back and forth?

A. Not exactly the swings. Much better, if the swing [66] is here, there is the net; much better if the swing is here there was the net (indicating). And they should be alert in that sense too. In my language I would say "en garde."

Q. Then, if you moved they would move with you as you swung; you did not mean they would move their feet? A. What is that?

Q. You did not mean if the net was here they should run over here (indicating)?

A. They should do that.

(Testimony of America Olvera Pollinger)

Q. And if you moved they should run over here?

A. Not exactly run, because it wasn't such a big swing. That was like a fire department, when somebody jump from the building.

Q. Did anyone say to you what the effect of eight or ten men moving a net back and forth as you performed in the air would be on the audience? A. What?

Q. Did anyone say anything to you about the effect of that sort of thing on the audience in so far as your performance was concerned?

A. That wouldn't have any effect. I don't know.

The Court: Did anybody ever say anything about it?

A. No, sir.

Q. By Mr. Combs: Do you mean to tell us, Miss Olvera, that from March to September, when you were hurt, these men moved back and forth under your trapeze as you swung on it, [67] when you performed?

Mr. Marcus: I don't think the witness stated that they moved back and forth.

Mr. Combs: That is exactly what she said.

The Court: That is argumentative.

Mr. Combs: I will withdraw the question and re-frame it.

Q. Will you please explain exactly what the men handling the net did when you made the swing backward and forward on your trapeze? A. What they did?

Q. Yes. A. They didn't do nothing.

Q. They stayed right where they were?

A. Right where they were.

(Testimony of America Olvera Pollinger)

Q. They never moved their feet?

A. No, sir.

Q. Never at any time, from March to September, your testimony is that they never moved their feet?

A. I am not saying no, from March to September, because I never need them to move it, because it was the first time I fell.

Q. You don't mean to give the jury the impression—

The Court: I think you are asking about what their custom was when she was performing her act. She was referring to the very last act.

Mr. Combs: What I am trying to bring out is the fact [68] that they remained there stationary right in the center under the trapeze during the entire period of time.

The Court: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

Mr. Combs: Let me see if I can clear that up.

Q. The conduct of the men who handled your net, or the net that was used, was satisfactory during the entire period from February to September, or March to September, was it not?

Mr. Marcus: I object to that as calling for the conclusion of the witness.

The Court: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled.

(Testimony of America Olvera Pollinger)

Q. By Mr. Combs: Was it?

A. Yes, because I never fell down; I never did need them to catch me.

Q. That is right, what I am trying to bring out is: You told them, or told their boss, to place that net, with its center right about directly under your trapeze when the trapeze was stationary, didn't you? A. Yes.

Q. Because that would cover the largest possible area of risk. A. Yes. [69]

Q. Your criticism of the manner in which they handled that net is directed solely to the fact that they did not move and catch you at the time you did fall, isn't it?

A. Yes, sir.

Q. In fact, isn't it true that if they had moved the net underneath you, during each performance, it would have diverted your attention, and have been an annoying thing to you in the course of your performance, wouldn't it? A. No, sir.

Q. Isn't it true that trapeze performers object to movement going on around underneath their trapeze during the performance?

A. I don't know what other trapeze performers do. I never did.

Q. How far from the outer end of the net did you fall? A. Scarcely a foot out, sir.

Q. When you fell, I understand you struck the back of one of the men holding the net?

A. Yes, I did.

Q. These men held the net in their hands?

A. A little closer to their body, Mr. Combs.

(Testimony of America Olvera Pollinger)

Q. Something like that?

A. Something like that.

Q. Indicating with my forearms extended perpendicularly to my body. And the loops of the net were around the wrist, through the palm of the hand? [70]

A. Yes.

The Court: In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you.

Q. By Mr. Combs: How far from the end of the fist would the net proper be?

A. I can't say exactly.

The Court: The net, Mr. Combs, came to the outer edges, with the exception of room enough there for the men to hold the rope, which was around the net, isn't that about correct?

Q. By Mr. Combs: I take it then it was something like that, isn't that correct? A. Yes.

Q. It was like that (indicating)? A. Yes.

Q. Indicating a rope around that, and these ends of the rope were attached to the net, and the canvas started approximately an inch or two beyond the hand, did it not? A. Perhaps.

Q. That would make the distance, if my forearm were typical, of something a little better than a foot from the middle of the body to the net, isn't that right?

A. Yes.

(Testimony of America Olvera Pollinger)

The Court: I don't believe it would be a foot from the front of the net. [71]

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isn't important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus. What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

(Testimony of America Olvera Pollinger)

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is. [72]

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Marcus: Yes.

Mr. Combs: Will you measure from my wrist out to where these fingers are? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body.

Mr. Marcus: About 11 inches.

Mr. Combs: Let us get that again.

The Court: The court will take a recess at this time. During this recess, gentlemen, bear in mind the admonition of the court.

(Short recess.)

(Stipulated that all the jurors were present and in their places.)

Q. By Mr. *Marcus*: Mrs. Pollinger, these net men did not do anything different on the night, or on the occasion, that you fell than they had been doing all the season, is that right? A. No.

Mr. Marcus: If they did anything different, assumes that they did do anything. I object to it upon that ground. [73]

Mr. Combs: They must have done something.

(Testimony of America Olvera Pollinger)

The Court: I don't think that objection is good, Mr. Marcus. Read the question, please.

(Question read by the reporter.)

Mr. Marcus: I object upon the further ground that it calls for the conclusion of the witness.

The Court: It does call for the conclusion of the witness. Objection sustained. The answer may go out.

Q. By Mr. Combs: The net was handled on the occasion of the day of your fall exactly the same as it had been the preceding months of your employment, is that right? A. Yes.

Q. Will you explain once again to the jury how you struck, and where you struck, if you can, the man holding the net, on your fall?

A. Yes, sir, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men.

The Court: You are referring to your right shoulder?

A. Yes, right here; not on the shoulder. I struck in here.

The Court: You changed around to your left shoulder.

Q. By Mr. Combs: Was it his right shoulder?

A. I try to show you. I don't remember.

Q. By the Court: You don't know whether it was the right shoulder? A. No, I don't. [74]

Q. But it was the shoulder, and outside of the arm?

A. Yes.

Q. By Mr. Combs: Would you be able to say how far from the net you were at that point?

A. Scarcely a foot.

(Testimony of America Olvera Pollinger)

Q. Scarcely a foot?

A. Or about a foot. Of course, you see—can I explain?

Q. Yes.

A. It would be very difficult for me to guess how far it is from here to here, if I haven't got a rule. I just imagine. From the fall I break my back. I can't remember exactly how much it was.

Q. I take it you are only attempting to make a rough estimate of that distance? A. Yes.

Q. Did you tip these net men for their services during the season?

A. Sometimes I would give them a package of cigarettes; sometimes I would give them a dollar.

Q. You would give them money quite regularly during the season, and tip them?

A. Not regularly.

Q. You did tip them during the season?

A. Not during the season. I said, sometimes I would give them a little something; sometimes I would give a necktie. [75]

Q. Or some money?

A. Not always. A dollar or something.

Q. After this accident you remained with the show of your own volition, did you not?

A. What is that, volition?

Q. You wanted to stay with the show, didn't you?

A. If I wanted to stay with the show?

(Testimony of America Olvera Pollinger)

Q. I mean, you travelled with the show because you wanted to be with the show rather than in a hospital, isn't that right? A. I was in bed, yes.

Q. That was because of your own desire; you wanted to be with the show? A. Yes.

Q. The Ringling people, or the Barnes people did not compel you to go along with the show? A. No.

Q. You were injured the year before, when you were with the Ringling show, on account of a fall, were you not? A. When?

Q. In 1936. A. No.

Q. Didn't you fall and injure both ankles?

A. I had an accident. Somebody dropped me down. That was 1935.

Q. You broke both of your ankles, didn't you? [76]

A. No.

Q. How did you injure yourself?

A. My hands.

Q. You broke your hands?

A. Yes, sir, I broke my nose.

Q. You also had an automobile accident subsequent to your injury with the Barnes show, did you not?

A. If I say yes I got to explain.

Q. You may. A. Thank you.

Q. You may always explain your answer.

A. I did not have exactly an automobile accident. There was some gentlemen. We had my husband's car, but to me, I couldn't call it an accident because nothing happened to me.

(Testimony of America Olvera Pollinger)

Q. When you first started your act on the night—was it the 11th of September you were injured, or the 12th? A. I think it was the 12th.

The Court: It says the 11th.

Mr. Marcus: I think that date was erroneously put in. Anyway, we will understand it is always referred to the day of the accident.

Q. By Mr. Combs: On the 12th did you look up and see if the hooks of your trapeze and its equipment were in place, before you started your act?

A. No. [77]

Q. I take it then that the first intimation that you had that the hook was not in place, the figure 8 hook, was when you looked up, virtually at the end of the first section of your act, is that right? A. I what?

Q. The first realization, or thought, or idea, that there was anything wrong with the figure 8 hook—

A. Do you mean when did I see it?

Q. I will withdraw the question. The first you had any idea that there was anything wrong with the figure 8 hook was when you looked up almost at the end of the first section of your act?

A. The first idea when the hook was overlapped was when I did the last exercise and fixed my point of view on the crane bar, then it shot out.

Q. At that particular moment it was then in the process of falling out, was it? A. Yes, sir.

Q. That swing you were making at that particular time, about how many feet was it?

A. It would be about four feet to the front, four feet to the back.

(Testimony of America Olvera Pollinger)

Q. Wasn't it more than that? A. No.

Q. This fall was 12 feet long, was it not?

A. Yes, sir. [78]

Q. Did you swing out a long way out so that your body was almost straight out from the trapeze?

A. No. Can I explain why?

Q. Yes.

A. All right. My apparatus was always set up in between the flying act. The flying act is the girl or boy, or two gentlemen and a lady who swing from the platform to the hands of the catcher, the hands of the catcher of the man who hangs on his knees. There is an iron apparatus in the platform. If I would swing further than what I have told you I would hit my knees against the apparatus, or would hit the large platform.

Q. Do you mean this trapeze can only swing four feet from the center of that ring?

A. No, sir, I can swing further, but not with the flying act.

Q. You are sure you did not swing back about 14 feet, overall; 7 feet out one way, and 7 feet out the other?

A. Yes, I am sure I didn't swing 14 feet.

Q. When you swung sideways with the trapeze, I take it that the swing was somewhat like this, back and forward, like this, wasn't it? A. Yes, exactly.

Q. About how far backwards and forwards did you swing in that?

A. About three feet in front and three feet back from [79] the center.

(Testimony of America Olvera Pollinger)

Q. Three feet each way?

A. I always want to explain. Can I?

The Court: Do you have to explain it? You said about three feet each way.

A. Yes.

Q. By Mr. Combs: You are sure you did not swing four feet each way?

A. I thought you were going to refer to that.

Q. Why did you think I was going to refer to that?

A. It would be impossible for you to understand, if I don't explain.

Q. Go ahead and explain.

A. The front of me is a bar like this, and I have got to swing just enough so that the bar won't go too much under the clevis. If I swing this way, the trapeze was still parallel, even, but if I swing further down the trapeze will point down, like that.

Q. Are you sure you did not swing four feet out each side? A. It might be four feet.

Q. It might be four feet?

A. It might be three and a half or four.

Q. When you did this spinner, or whirligig, where did you fix your point of vision?

A. I fixed my point of vision right straight to my [80] body, which would be about the beginning of the circle of the ring; straight this way, and about to the end of the table, a little before. There is where my face is, straight about there, that should be my point of view.

(Testimony of America Olvera Pollinger)

Q. And that point was some object on the ground, wasn't it? A. Sure.

Q. Something on the ground?

A. Yes, it would be, as I say, the start, the beginning of the ring.

Q. The ring curves?

A. Yes, sir, the ring curves.

Q. You, I take it, do not know then of your own knowledge when the 8 hook became overlapped, do you?

A. No, sir, I don't.

Q. When you fell down you fell out of the front of the trapeze, did you not?

A. No, to one side.

Q. To one side?

A. To one side; this side.

Q. The left or right? A. The right side.

Q. I take it that that was also the side that the figure 8 hook was tangled up on? A. Yes.

Q. You do not know when the crane bar of your equipment [81] was put in place, do you?

A. It was put in place with the trapeze at the time, all together.

Q. Wasn't the whole trapeze hung in the big top before the performance?

A. Before the performance?

Q. Before the show even was put on?

A. It was put some place at that time. I might not know, because I wasn't in the circus when the tent was up.

(Testimony of America Olvera Pollinger)

Q. I take it on that occasion, or any other occasion, you did not know when the crane bar was hung to the bull ring?

A. The crane bar is always attached, as it is here, and when they put that up it has to go up.

Q. Please answer the question, America.

A. Yes.

Q. You did not know on that occasion, or any other occasion, when the trapeze was put in place, did you?

A. No, sir.

Mr. Marcus: You are confusing the crane bar with the trapeze.

Q. By Mr. Combs: When the crane bar was put in place? A. Yes.

Q. Is that the crane bar with a clevis?

A. Yes.

Q. The trapeze goes up with the crane bar? [82]

A. Yes.

Q. It is hung to the bull ring on the main post or pillar of the tent?

A. I don't know what bull ring means.

Q. Did this figure 8 hook ever get tangled before this date, September 12, at Anthony, Kansas?

A. No.

Q. It never had before in your entire performance?

A. The 8 hook?

Q. Yes. A. No.

Q. It always hung perfectly when you performed?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. You say it was dark in the top of the tent at the time when you came out for your act, is that right?

A. Yes.

Q. How do you know that?

A. Because when there is no light there you have to know there is dark.

Q. Was that the manner in which you knew that fact?

A. Yes.

Q. You didn't look, did you?

A. Don't try to embarrass me, because I tried to explain; you don't have to know. You have to see it. I saw it was dark.

Q. You did not look up into the top of the tent at the [83] time, did you?

A. No. It was dark all over.

Q. Dark all over the top of the tent?

A. Yes.

Q. Isn't it true there are lights on in the tent at all times during performances?

A. Not in the afternoons.

Q. When the performances are going on?

A. Not in the afternoon at that time.

Q. On this particular afternoon there were no electric lights burning in the tent?

A. No, sir, not only that particular afternoon; the lights go on just when the dynamos begin going on. They never go in the afternoon, I mean, at that time.

Q. What time of day did this accident take place?

A. Around 4:00 o'clock.

(Testimony of America Olvera Pollinger)

Q. Do you know when it gets dark in Anthony, Kansas, about September 10th?

A. Honest, I wouldn't be able to say about what time.

Q. Your testimony is positive, however, that there were no lights on in the tent at this particular time?

A. Yes.

Q. How did it happen you were able to see the figure 8 hook so clearly when you looked up there to gain your point of vision?

A. Because I got between there and my body, five feet [84] three inches high. The lines, suppose they are 12 feet from this, how many feet would my eye be from the crane bar? It wouldn't be such a distance.

Q. So your explanation of that answer is that you were a great deal closer and you were able to see the 8 hook because you were nearer to it, notwithstanding the dark shadows up there, is that it?

A. I beg your pardon?

Q. I will withdraw the question. I believe you testified on your direct examination that your husband lowered one side of the crane bar to compensate for the shortness of the line on account of one of these hooks?

A. He never did, sir.

Mr. Marcus: You are assuming, counsel, that she made such statement.

The Court: You had better refer to the record. She said she did not say it.

Mr. Marcus: The reporter may look it up. You don't mean to say, counsel, that it is there, do you?

(Testimony of America Olvera Pollinger)

Mr. Combs: I mean to state that I believe that I heard this witness so testify. I am quite sure it will be found there, counsel.

Q. I take it then that your husband did not do anything to compensate for the crane bar, or for the shortness of one of those lines on account of the figure 8 hook being hooked up, is that right? [85]

Mr. Marcus: That is assuming facts not in evidence, that she so testified her husband did anything, least of all, did something to compensate.

Mr. Combs: I want to say this, that there is a very distinct and positive recollection in my mind that that is her testimony. I wrote it down in quotes. If I am wrong I will be glad to acknowledge that error, and be glad to say so. But the question I have asked I think is a proper question. I want to find out what the true fact is, regardless of whether I am right or wrong in my impression of her testimony.

The Court: Read the question, please, Mr. Dewing.
(Question read by the reporter.)

The Court: Is there any objection? This doesn't refer to her testimony; it refers to the fact.

Mr. Marcus: It is assuming, your Honor, in the first place, that there was something to be compensated for there; something that was out of balance to her knowledge, that her husband did.

The Court: In any event it calls for the conclusion of the witness. Mr. Combs, you don't mind the court suggesting something?

Mr. Combs: Not a bit.

(Testimony of America Olvera Pollinger)

The Court: In your questions you have used the phrase a number of times "I take it" such and such. Just ask the question directly, and I think it will be more definite.

Mr. Combs: I will withdraw it and reframe it. [86]

Q. Miss Olvera, you didn't observe anyone make any adjustment in the crane bar to compensate for one of those lines being shorter than the other, on account of the figure 8 hook being hooked up, did you?

Mr. Marcus: I object to that as assuming that she had knowledge at the time that the line was not level, or that she had knowledge that something was done to compensate for the line being out of level.

Mr. Combs: Just answer the question; if she saw anybody do anything.

Mr. Marcus: Ask her that question.

Mr. Combs: Did you?

The Court: Read the question.

(Question read by the reporter.)

The Court: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained.

Q. By Mr. Combs: Miss Olvera, if your figure 8 hook were hooked up in some manner out of place it would shorten the line from the point of this eye hook down to your trapeze bar, would it not?

A. Yes, positive.

(Testimony of America Olvera Pollinger)

Q. But when you came into this performance, I understand- [87] stand you looked at your trapeze bar and determined it to be exactly level?

A. Perfectly level.

Q. In fact, you could not have performed any of your act if it had been in the slightest degree out of level, isn't that true?

A. No, I could not.

Q. Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn't it?

A. What?

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

The Court: Do you mean act or action?

Mr. Combs: I mean act.

The Court: Reframe the question.

Q. By Mr. Combs: Your act requires very great precision and accuracy of movement of your feet and your body, doesn't it?

A. If I don't get it, can I say what I have to do?

The Court: Do you understand the question?

A. No, sir.

Q. By Mr. Combs: The performance of your act requires very accurate placement of your feet and your body and hands and of your trapeze, doesn't it?

A. My trapeze, yes. If my trapeze is perfectly level [88] and steady, I mean guyed tight, I can perform my act.

Q. You can perform your act?

A. Yes, that is why I need to have my lower bar perfectly level.

(Testimony of America Olvera Pollinger)

Q. If your lower bar were not perfectly level, you would know it at once when you stepped on it?

A. Yes, instantly.

Q. That is likewise true, if one end of your bar swings out further than the other end? A. Yes.

Q. You would notice it at once? A. Yes.

Q. In this particular case at Anthony, Kansas, your bar did not swing out on one side ahead of the other, did it? A. No.

Q. Yet, according to your statement, one of these lines was shorter than the other, wasn't it?

A. Now is what I know, but if I know at the time, sir, no money in the world will I have done it; would I go up.

Q. Isn't it true, Miss Olvera, that if one of these lines were longer than the other line, the longer side, on a swing even of 8 feet backward and forward, would swing out ahead of the other?

A. No, not if the lower bar were perfectly level.

Q. Are you sure that the existence of the level condition of the lower bar would affect your swing? [89]

A. Absolutely.

Q. And you state, if one of these lines were two inches shorter than the other— A. Yes.

Q. —that the shorter side would swing exactly the same length, on a swing out, as the longer side, is that right?

Mr. Marcus: That assumes a fact not in evidence. It asks her for an expert opinion; he has not assumed, in his assumed case, or placed Miss Olvera on the bar,

(Testimony of America Olvera Pollinger)

because her weight was on the bar at the time she was swinging, which would make a lot of difference.

Mr. Combs: It wouldn't make any difference at all.

Mr. Marcus: I submit, your Honor, that it assumes facts not in evidence; not based on a hypothetical question as the facts disclosed from the evidence here today.

The Court: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn't it, Mr. Combs?

Mr. Combs: Certainly, your Honor.

Mr. Marcus: If he did, your Honor, I don't believe the question includes that statement.

Mr. Combs: We will just amend it to include it then.

Mr. Marcus: Thank you.

Q. By Mr. Combs: Referring to the time you were on the bar, if one line supporting that bar was shorter than the other line which is on the bar, isn't it true that the [90] longer side will swing out a little further than the shorter side?

A. No, because I am there extending out, and the lower bar is level, perfectly level, and I am working with a balance.

Q. Do you mean to say you can control that swing by the use of your hands and your body?

A. I don't mean to say I can control it. I control my trapeze during my act, but the trapeze did not swing to one side out more than the other.

Q. On this particular occasion you did not have to use your body to control it from swinging out further on one side than the other?

A. No.

(Testimony of America Olvera Pollinger)

Q. Because both sides swung out perfectly level?

A. No.

Q. Because neither side swung ahead of the other?

A. No.

Q. If one had swung further than the other, with the precision of your act you would have known it?

A. Yes.

Q. Even if it be an inch or two? A. Yes.

Q. The answer is yes? A. Yes.

Q. When you use the sideways swings with the bar, on [91] that occasion did the bar with the longer fall line swing out a little bit further than the bar with the shorter? A. No, sir.

Q. Exactly the same distance?

A. Perfectly the same distance.

Q. Had it done so you would have noticed that?

A. Yes, sir.

Q. Isn't it true, Miss Olvera, that where a bar is suspended level on two lines, one shorter than the other, the arc or swing of the longer line will be a little greater than that of the shorter?

A. Not if the swing is a short distance, and what is hanging there is extremely heavy.

Q. You believe that the weight of the object supported alters the degree of the swing of this arc, is that right?

A. I don't mean that. I mean this: Here is the same thing, and this other the same thing. All right. We support it from the bar and we lower this further, and we swing it. It never goes out.

(Testimony of America Olvera Pollinger)

Q. That's right, but supposing the one on your left were longer than the one on your right.

A. I beg your pardon?

Q. Supposing the one on your righthand were longer than the one on your left, isn't it true that the arc described by the point constituting the star, in fact, on each side of this trapeze, would be a greater arc, or longer arc than the [92] one on the shorter side?

A. It would be just the same, if it was on the right or was the left, as long as the top was out of level and controlled the level of the lower one.

Q. I take it your answer—withdraw "I take it." Your answer then is no, the swing on both sides would be the same, is that it? A. Yes, sir.

Q. And likewise that is your answer respecting the swing sideways; they go out the same distance on each side? A. Yes.

Q. Notwithstanding one of these lines was longer than the other, because the figure 8 hook is hooked up, is that right? A. Yes.

Q. I want to be very clear on this subject: When you looked up at that crane bar did you see anything wrong with the clevis or the attachment by which the crane bar was hooked up to the big top?

A. When I performed my last exercise, yes, I did.

Q. What was wrong with the clevis?

A. The clevis, oh, nothing was wrong with the clevis

Q. Nothing at all?

A. No. I mean the other hook was out of place, the hook was supposed to be like my hand, and instead

(Testimony of America Olvera Pollinger)

of the clevis being here it was in another little curve, which is [93] on the side.

Q. The clevis did not hang right in the middle?

A. Yes, in the middle. Presume my hand is the hook, and instead of hanging here it was hanging here, because the hook was made this way, and has another little curve like that, and the clevis was hanging here instead of here, and with the whole weight, and the tightness of the guy line, it kept it in place, and then when the figure 8 hook was down I realize the trapeze, if this hook really wasn't in the normal position, would make the trapeze come further down.

Q. That caused a drop in the level of the trapeze of how many inches on one side?

A. Sometime ago I said what I saw. I told you it would be four inches. The way I saw was about five or six.

Q. Five or six inches? A. Yes.

Q. Which end of the crane bar was the clevis hooked up on out of place?

A. I don't know now which end, because they look the same.

Q. You looked up there and saw it? A. Yes.

Q. When you looked up for your fixed point of vision, tell us what you saw.

A. I saw it, in the trapeze, on the right side.

Q. Was it the same side the figure 8 hook was hooked up [94] on? A. Yes.

Q. It was? A. Yes.

(Testimony of America Olvera Pollinger)

Q. Your entire first section of your act took about three minutes, is that right? A. About.

Q. You had practically completed the same when this accident occurred, is that it? A. Yes.

Q. During that time you did certain stationary acts on the bar, such as picking up a handkerchief, and standing on one leg, or both knees, pausing, changing your position from foot to back, and twisting your legs?

A. Yes.

Q. In addition to that you did certain acts in motion, comprising the swinging act three or four feet out on each side? A. Yes.

Q. And that swing act you estimate is four feet out in front and four feet out in back? A. Yes.

Q. In addition to that you spun the trapeze around so it wound up the falls completely behind your back, and then you allowed it to unspin and brought it to a stop with your body, is that right? [95] A. Yes.

Q. During all of these performances nothing occurred in relation to the figure 8 hook; it remained in the same position it had been in when the trapeze was erected, is that right?

A. Nothing occurred in the first part of the act.

Q. Your bar remained level, despite all of this movement; the figure 8 hook remained where it was when the trapeze was raised? A. Yes.

Q. When you fell you are sure you didn't lose consciousness for a single moment; you had complete consciousness up to the time you were removed to the hospital and given an anesthetic, is that right?

A. Absolutely, sure.

(Testimony of America Olvera Pollinger)

Q. You looked up at that time, and looked at the trapeze? A. Yes.

Q. And made certain remarks to which you have testified? A. Yes, sir.

Q. How long did you remain there immediately after the fall? A. In the ring?

Q. Yes.

A. Heavens, not even a second. I hardly struck the earth when my husband ran and picked me up.

Q. I will ask you whether or not you testified in the [96] former trial in this matter, on or about the 16th of January, 1940, in the afternoon of that day. Calling your attention, counsel, to page 228 of the transcript, the question beginning there, and ending with folio 254, did you testify at that time and place—

Mr. Marcus: I stipulate that she so testified.

Mr. Combs: You stipulate that she testified as follows; I will read it?

Mr. Marcus: Yes, go ahead.

Mr. Combs: "Q—When you struck the ground, Miss America, were you in the ring?

"A—I fall right on the shoulders of a man who was holding the net and his back was right inside the ring." Now, I will ask you, reading from page 234, folio 292, as follows:—would you stipulate she testified?

Mr. Marcus: Let me see what you want her to testify to. I haven't any objection to reading that testimony, but I see no purpose in it.

The Court: Ask your question.

Q. By Mr. Combs: Did you testify at that time and place as follows—

(Testimony of America Olvera Pollinger)

Mr. Marcus: I submit, your Honor, that is not a proper method of impeachment. I ask that the matter be handed to the court, to determine whether such question and answer do impeach the testimony of the witness.

Mr. Combs: I suppose technically that I would have to [97] take the original—

Mr. Marcus: I am not objecting on that ground. Show it to the court.

The Court: That, as the court recollects, is not contrary to the testimony now.

Mr. Combs: She said three feet.

The Court: She said possibly four.

Mr. Combs: May I read it for whatever weight it has?

The Court: You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it.

Mr. Combs: It seems to me the question of weight would be a question for the jury.

The Court: No, that is a question of impeachment. The court has to rule whether or not it is an impeaching question. For the purpose of the record you may read it, laying your foundation.

Mr. Combs: I didn't like to be persistent, your Honor—

The Court: The Court said you may read it.

Mr. Combs: The only question is, the remarks of the court: It may be read to the jury, but I believe there is no weight to this. That is a question for them.

The Court: It is, if the court permits it to be answered.

(Testimony of America Olvera Pollinger)

Mr. Combs: "Now will you proceed and tell us from the [98] point where you started swinging sideways and continue from where I interrupted you.

"A—I was swinging this way when you interrupted me. Sideways, this way (indicating).

"Q—Now let me stop you a moment there. By sideways, you mean you swung on this bar back and forth parallel with the crane bar, is that it?

"A—Yes.

"Q—What was the distance of that swing, approximately?

"A—Approximately from here, from the start it goes about four feet.

"Q—About four feet on each side, or a total swing of about 8 feet?

"A—One time and another time, no more than 8 feet.

"Q—Over all, the whole swing, 8 feet approximately?

"A—I don't understand the word 'overall.'

"Q—Well, all right. Four feet to one side and back over four feet on the other side, is that right?

"A—Yes."

The Court Is there any objection, Mr. Marcus, or not?

Mr. Marcus: No, I am not objecting to it.

The Court: Did you so testify?

A. Yes.

Mr. Marcus: I stipulated in the beginning that she so testified, your Honor. The witness indicated that I should approach her. [99]

The Court: She desires to speak with you? She has a right to do that.

(Testimony of America Olvera Pollinger)

Mr. Combs: I don't seem to find the matter I am looking for, your Honor. I am satisfied it is in here. I believe that will be all the cross examination at this time.

The Court: Do you indicate that you would like to cross examine later? You had better finish the cross examination now, if there is to be any more.

Mr. Combs: It would only be if I asked leave of court. I did not mean to put a joker to it, so that I could come back later.

The Court: Any redirect examination?

Redirect Examination

Q. By Mr. Marcus: Miss Olvera, you testified that so far as you knew the net was handled satisfactorily until the date of the accident. Do you remember that?

A. Yes, sir.

Q. Did you have any occasion to require the services of these net men at any time prior to the date of the accident?

Mr. Combs: That is objected to as calling for the conclusion of the witness. The testimony is they did act during all that period of time.

The Court: Do you mean by that, did she fall at any other time?

Mr. Marcus: That's right.

The Court: Ask her. [100]

Q. By Mr. Marcus: Did you ever fall at any other time? A. No, sir, I never did.

Q. Did they have to render any service to you with reference to this net prior to the date of the accident?

A. No.

(Testimony of America Olvera Pollinger)

Mr. Combs: I object to that as calling for the conclusion of the witness, and ask the answer be stricken.

The Court: The answer may go out. Objection sustained.

Q. By Mr. Marcus: When you stated, Miss Olvera, that the services of the net men were not satisfactory—

A. The day I fell.

Mr. Combs: May we not have an opportunity to object?

The Court: Yes. When there is an objection, Miss Olvera, you must wait until the court rules on the objection.

Mr. Combs: I object to that as argumentative and calling for the conclusion of the witness.

The Court: I think this is proper redirect. Mr. Combs opened up that line by asking her if it was satisfactory. I think it is proper redirect. Objection overruled. The answer may stand.

Q. By Mr. Marcus: That was the first time that you required their services, as net men?

Mr. Combs: That is a leading question.

Q. By Mr. Marcus: When was it that you required their services as net men?

Mr. Combs: I object to that as calling for the conclusion [101] of the witness, and not proper redirect.

The Court: Objection sustained.

(Testimony of America Olvera Pollinger)

Mr. Marcus: I think that is all, your Honor.

Mr. Combs: No further examination of this witness.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., the following day, Wednesday, January 5, 1944.) [102]

Los Angeles, California, Wednesday, January 5, 1944;
10 A. M.

(Stipulated the jurors were present and in the box.)

Mr. Marcus: Your Honor, at this time I am going to read the evidence of Dr. Steele Stewart, who happens to be in government service in the South Pacific, so I have been advised. Counsel has agreed to it, and counsel and I will read the questions and answers. Counsel will read the questions, and I will read the answers. This is Volume 3 of the transcript, page 276. May I make a statement to the jury as to what we are doing?

The Court: Yes, you may.

Mr. Marcus: One of the doctors in this matter, who testified on behalf of Miss Olvera, is in the government service, and unable to be here, and we are reading his testimony from the prior trial in this case.

The Court: In the absence of the doctor you are giving the testimony by reading the transcript of his testimony taken at the other trial?

Mr. Marcus: That is correct, your Honor.

DR. STEELE STEWART,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am asking these questions on behalf of the plaintiff, but Mr. Combs is taking my place, and I am acting as the doctor. (Questions read by Mr. Combs; answers read by Mr. Marcus): [103]

"Q—Doctor, what is your business or profession?

"A—Orthopedic surgeon.

"The Court: Your name, Doctor?

"A—Steele Stewart.

"Q—By Mr. Marcus: You practice in the city of Los Angeles?

"A—Yes, sir.

"Q—What is your specialty, Doctor?

"A—Orthopedic surgery.

"Q—What qualifications do you have as such orthopedic surgeon?

"A—Well, I graduated from the University of Pennsylvania in 1918; spent thirteen months in the Peter Bent Brigham Hospital at Boston; six months in the Childrens' Orthopedic Hospital in Boston, in orthopedic surgery; in the Massachusetts Hospital as orthopedic surgeon; began practice here in the early part of 1922; been on the staff of the Childrens' Hospital as an orthopedic surgeon ever since; on the staff of the General Hospital here five or six years, until I resigned; the same in the San Bernardino Hospital; on the staff of the Cedars of Lebanon Hospital; at the present time I am Assistant Professor of Orthopedic Surgery at the University of Southern California.

(Deposition of Dr. Steele Stewart)

“The Court: You don’t need to proceed.

“Q—By Mr. Marcus: Did you examine Miss America, Doctor?

“A—I did.

“Q—Did you examine the X-rays? [104]

“A—I did.

“Q—Did you examine these X-rays here that I show you? For the purpose of the record, they have been marked Plaintiff’s Exhibits 6 and 5.”

Mr. Marcus: They have been marked Plaintiff’s Exhibits 6 and 5 in the former trial. May we introduce these X-rays? I presume they will be marked in this proceeding?

Mr. Combs: No objection.

The Court: They may be received.

Mr. Combs: Some of them are ours.

Mr. Marcus: Let them both go in.

The Clerk: There are three exhibits here.

The Court: Which ones are you offering?

Mr. Marcus: Plaintiff’s Exhibits 5 and 6.

The Court: Which one do you want marked first?

Mr. Marcus: I think February 5, your Honor.

The Court: It may be received as Plaintiff’s Exhibit No. 3 in this case. The other one will be Plaintiff’s Exhibit No. 4.

(Deposition of Dr. Steele Stewart)

"A—I examined that group (indicating) and I examined that group (indicating).

"Q—Doctor, did you perform a physical examination on the body of America Olvera?

"A—I did.

"Q—When was the examination made, Doctor?

"A—The 13th of this month. [105]

"Q—January, 1940?

"A—Yes.

"Q—Will you relate the history she gave you of the case at that time?"

Mr. Combs: Do you withdraw that question?

Mr. Marcus: Yes.

Mr. Combs: Line 23, is that right, Mr. Marcus, for the next question?

Mr. Marcus: Yes.

"Q—Doctor, what did you discover at the time you performed your physical examination?

"A—I noticed that the patient walked with crutches; she dragged her right foot when she walked, and that she stood with slight assistance from her husband, without the crutches for a few moments. There was a swelling in the small of the back, over the spine; and on the examining table the patient's hips did not permit the ordinary range of motion that we see in the normal individual, and she made complaints of pain when the legs were moved to the extreme, and she was unable to lift her right thigh from the table when she was in a sitting position. She was unable to straighten her right leg

(Deposition of Dr. Steele Stewart)

when in a sitting position. She was able to bring her great toe—I mean, move her foot to the side of her great toe to a slight extent. She could move the toes a little bit. She exhibited an area of anesthesia to stroking with cotton. [106]

“Q—What does that ‘anesthesia’ mean, doctor?

“A—Anesthesia means she could not recognize when she was touched with a wisp of cotton over the front of her thigh, from the level of her pelvis down over the leg and foot.

“There was an area that extended irregularly along the back of the leg in which she was able to so recognize the cotton. We stuck her with a pin a great many times over this same area; for the most part she was unable to tell where it stuck her. There were a few places that she could recognize the fact that the pin did stick her; most of the time she gave no indication of having been stuck with a pin, though.

“Her reflexes, and by that we mean the reaction of a part of the body to stroking or a blow with a hammer, the involuntary reactions of the body to that stimulus showed that the reflexes were different on the right and left side; and on the right side the muscles that reacted from that blow, the knee joint, were not the ones that ordinarily reacted. At the ankle, both jerks were present, but in unequal degree.

“Q—Doctor, you examined the X-rays, did you not?

“A—I examined the X-rays.

“Q—I wonder if you would be kind enough to read those to us, please, and tell us what you discovered from them. Give the dates that they bear, please. [107]

(Deposition of Dr. Steele Stewart)

"A—Starting with Plaintiff's Exhibit 5, which is dated 5/13/38, it shows a compressed fracture of the first, second and third lumbar vertebrae. The lumbar vertebrae are those portions of the spine which make up the small of the back and below the rib cage and above the pelvis. There are five of them. That is a posterior view of the same general area, and it shows some evidence of bone reaction between the first lumbar and the twelfth dorsal.

"Q—That second one, the posterior view, doctor, that was taken on the same date? Does it bear the same date?

"A—5/13/38. It is the same date. It is practically an identical picture with the previous one.

"The next one, taken 7/27/38, which is Plaintiff's Exhibit 6, a lateral view, shows identically the same thing as we saw in the one of 5/13/38.

"Q—You don't see any additional fracture lines, do you?

"A—No, sir. The one of the pelvis, 7/27, the only remarkable things I see in that are two irregular or ovoid bodies, apparently bony in character, one lying either within or without the pelvis. I cannot say which. The larger one on the right side, one lying external to the hip joint on the left side.

"And this view (indicating) is practically an identical view.

"Q—Doctor, what effect did those three fractures have, or what effect could they have upon the spinal column? [108]

"A—Well, they make a reverse curve of the spine, by reason of the fact that they are wedged-shaped. The part

(Deposition of Dr. Steele Stewart)

that ought to be concave now becomes convex and would be the cause of the lump which I observed in her back.

“Q—Did you find in the X-rays that the curve of the back was changed?

“A—Well yes.

“Q—That was indicated from your examination of Miss America?

“A—From the examination.

“Q—Does that show on the X-rays, too?

“A—And it would cause a weakness of the spine, so that a person wouldn't have the normal strength in the spine. The inflammation that is incident to the fracture and the healing of the fracture and using a bad position, all of them would cause pain in the back.

“Furthermore, in the course of the examination I forgot to say that her back was tender to pressure.

“Q—Doctor, what do you mean, or could you explain to us a little more in detail what a compressed fracture is?

“A—Well, a piece of the spine, which we call a vertebra, is a good deal like a soft piece of wood; and if you took that piece of wood and lay it on the floor and hit it with a sledge hammer along one edge, why, you would get a wedging of the body of the block of wood and a driving of one cell after another into cells that lie below it. Do I [109] make myself clear? I don't know.

“Q—Doctor, are there any nerve centers in the area where you found the fractures?

“A—There are many nerves that pass down to supply the lower legs.

(Deposition of Dr. Steele Stewart)

“Q—Could you tell us, Doctor, from your examination of her leg, or do you have any opinion, Doctor, from the examination of her leg, what causes the condition you found to exist?

“A—Well, it is a very bizzarre picture, and the fracture of the spine, in and of itself, would probably not cause that picture. It would be a thing which would result from injuries to the spinal cord or the nerves coming off from the spinal cord.

“Q—In the area where the injury occurred, Doctor?

“A—Yes, or it might occur anywhere. I feel that it is essential to the medical testimony that I indicate just how I understood the accident occurred.”

“Q—Doctor, is it necessary that you give the declarations and statements made to you by Miss America Olvera in order for you to form an opinion as to the nature and extent of her injuries?”

Mr. Marcus: I will go a little further down, line 16, page 285.

Mr. Combs: That's right.

“Q—Doctor, did you discuss with Miss America Olvera the [110] nature of her injuries?

“A—Yes, I discussed with her the—

“Q—Just answer yes or no on that, Doctor. And did you discuss the manner in which the accident happened, with her?

“A—Yes.

“Q—Did she relate to you at the time the manner in which the accident happened?”

(Deposition of Dr. Steele Stewart)

Mr. Combs: I guess we will go down to line 10 on page 286?

Mr. Marcus: That's right.

"Q—Did she state to you, Doctor, the manner in which she believed the accident happened?

"A—Yes.

"Q—Doctor, in order for you to form an opinion as to her disability and injuries, is it necessary for you to give, as a basis therefor, the history and the statements given to you by Miss America Olvera?

"A—Yes, sir.

"Q—Will you please relate the conversation, now?"

Mr. Combs: The answer is on line 15: "A—The essential things in her statements to me were that she fell a distance of about 40 feet and landed in a sitting position, or in—landed on her hips with her feet and head up, semi-jackknife position, in reverse position.

"Q—Is that all you need, Doctor, in order for you to [111] form your opinion?

"A—And that she was not knocked unconscious.

"Q—Doctor, do you have an opinion at this time as to—I believe that is where we left off this morning—as to the injuries to the spinal cord?

"A—Yes, I do.

"Q—Will you give that, please?"

Mr. Marcus: Down to line 13:

"Q—Doctor, would it make any difference if she had fallen 20 feet or 40 feet, as a basis for your conclusion?

"A—The conclusion that I reached, based on the history of a fall from a reasonable height, or a considerable

(Deposition of Dr. Steele Stewart)

height, landing in that position, combined with the evidence that we had objectively of disability involving her right leg—and by this disability we mean the inability to use the leg, the disturbance of sensation, a slight disordering of the reflexes—was that she, in all probability, sustained a hemorrhage or hemorrhages into the spinal cord.

“Q—Are you acquainted with nature of physical effort required by a trapeze performer, just generally?

“A—I have seen trapeze workers, or artists, rather, and know something about how they perform. I have not had any personal experience with the bar, and so on.”

Mr. Combs: Page 290?

Mr. Marcus: That's right.

“Q—Can you tell us to what extent her injuries have [112] disabled her physically?

“A—I think it would be a very difficult thing for her to engage in any occupation that required her to be on her feet, either standing or walking, for any length of time, and where any great distance was concerned. I think it will be possible, not knowing at all what her educational background is, that she should be able to do some type of work where she can sit most of the time.

“Q—Doctor, do you have any opinion at this time as to whether or not such injuries as hers are permanent?

“A—Assuming that our diagnosis is correct, and that hemorrhages have occurred into the cord, as is our belief, the result of those would be two: first of all, causing degeneration within the cord, and, second, scar tissue within the cord, so that the individual would have

(Deposition of Dr. Steele Stewart)

practically no chance of a complete restitution or partial restitution at this late date."

"Q—You know that this accident occurred in the year 1937, do you not, Doctor?"

Mr. Marcus: Maybe we should inform the jury that now they were proceeding in the cross examination.

The Court: Yes.

Mr. Combs: Mr. Combs is cross examining the Doctor at this time.

Mr. Marcus: It so happens that Mr. Garrett was doing the cross examining. [113]

Mr. Combs: Yes.

"Q—You know that this accident occurred in the year 1937, do you not, Doctor?"

"A—I was told that.

"Q—Are you engaged in treating the plaintiff, or were you retained merely to make this one examination?"

"A—I was asked to make the examination, was all.

"Q—Did you find, in the course of your examination, any definite organic pattern or picture which would account for the symptoms indicated?"

"A—It was, as I stated in my direct testimony, a very bizarre picture, and you could not hypothecate a single, tiny injury to the cord that would produce the entire picture that she had. The usual situation is that with an injury of this type, a fall or landing in that position, you get multiple little hemorrhages, so it is my feeling that we do have evidence of an organic basis that we cannot sidestep entirely.

(Deposition of Dr. Steele Stewart)

"Q—And that evidence of an organic basis is based, to some extent, I suppose, upon subjective symptoms?

"A—Yes. In examination for anesthesia, I cannot tell you whether you feel a thing or not; I have to depend on you telling me whether you feel it or not. However, she was consistent. As we checked back and came to the same spot, the same change would occur at that point, which would lead us to believe it was a true anesthesia. [114]

"Q—Before I forget it, as a layman I would like to ask you what the word 'bizarre' means in the sense you use it in speaking of the situation as being rather bizarre.

"A—Well, it is a picture of symptoms that is not definable as being caused by a single, definite lesion or injury.

"Q—You had never seen Mrs. Pollinger, of course, before she came to you for examination this month; is that correct?

"A—That is correct.

"Q—Your opinion regarding her disability for further employment, or partial disability, let us say, one or the other, is based, to some extent, upon the subjective symptoms, is it not?

"A—Yes, sir.

"Q—That is, the complaint she makes, that would keep her from standing?

"A—Yes, in part, and in part, too, the pain that is in her back, which is a very frequent, almost universal, result of severe back injury such as she has.

"Q—In addition to being a common result, your information that she has it is also drawn from her sub-

(Deposition of Dr. Steele Stewart)

jective complaints? That is, she tells you she has it, is that correct?

“A—Yes.

“Q—Doctor, considering the accident happened in 1937, [115] would it change your conclusions any—and I will ask for a ‘Yes’ or ‘No’ answer to this—if you learned at this time that in October, 1938, a little more than a year ago, she had, upon examination, complained of pain upon extreme motions of the right hip and some tenderness to pressure about the right hip region; that she complained of pain in this region upon extreme rotation of the thigh, and upon weight bearing; that there was at that time no deformity or external evidence of injury; that at that time, on the neuro-muscular side, all of her reflexes were present, normal and equal on both sides; that there were no tremors, no atrophies, hyper-atrophies, paralyses, anesthasias or paresthasias, no thesias, no central nervous lesions—if it were established that such was the situation at that time, would that have a tendency to change your opinion in any particular from the opinion you have given here?”

“A—Well, I would want to know, in addition to that, something about the examiner and his relative care in making examinations. The X-rays which I saw, I believe, antedated that, and they show deformity, so on that ground, if your hypothetical question is correct, I would think that there had not been an adequate examination by the examiner.

“Q—Perhaps you are right, and perhaps you do not understand my question. It is rather an involved one, and I am a layman, so far as your profession is con-

(Deposition of Dr. Steele Stewart)

cerned, so I [116] will ask you one question to make sure that we understand each other. When you speak of the bony pathology—is that what you call it?

“A—That is right.

“Q—Were you speaking at the time of the evidence of injury to the segments of the spine?

“A—Yes.

“Q—Yes, that is right. Did you understand me to read anything to you concerning the spine or pathology of the spine? I ask that, because I think if you did you misunderstood me and I can clear it up by going back over this question.

“A—What you read, as I understood, was that you said there was no deformity. You didn’t state where the deformity was or where there was no deformity.

“Q—Considering that the examination has been confined to the lower extremities and bearing in mind the date of the occurrence of this accident, would it change your opinion, or any of the opinions you have expressed here, if you knew that as a fact, if it is a fact, on October 13, 1938, with respect to her lower extremities, on examination she complained of pain upon extreme motion of the right hip and some tenderness to pressure about her right hip joint region. She complained of pain in this region upon extreme rotation of the thigh and on weight bearing; there was no deformity or extreme evidence of injury. Neuro-muscular: all of her reflexes were present and normal and equal on both [117] sides. There were no tremors, atrophies or hypertrophies, paralysis, anesthasias or paresthasias. No evidence of any central nervous lesion?

(Deposition of Dr. Steele Stewart)

“A—I would feel that the question, or the evidence that is permitted would be only partial, in this respect: That no evidence of any central nervous lesion—that would not necessarily exclude the fact that pain and tenderness around the hip joint came from some lesion of the nervous system; and I think it is a conclusion that is not completely warranted by the facts recited as he gave them, or as you gave them, rather. And as far as the other symptoms are concerned, I still would say that I would like to know something about the general care of the examiner, in that regard.

“Q—Do you have any history, Doctor, of any previous falls that the patient had had?

“A—The patient stated that several years before—I don’t know the date offhand—she had had a fall in which she had broken her wrists or dislocated her wrists; something of that sort. She still shows some of the effects of that. I don’t just remember how it occurred, except that she told me she fell on her face and guarded her face with her hands, but I don’t recall anything else.

“Q—Were you given any history of any injury occurring, Doctor, after this accident sued on here, which occurred in 1937? [118]

“A—I don’t recall any other history of any other, although it seems to me that she said something about there had been an automobile accident, something of that sort, but it was evidently a very minor affair, from the way they spoke of it.

“Q—Now, Doctor, if it were established as a fact that the plaintiff had no—without respect to the care of the

(Deposition of Dr. Steele Stewart)

examiner, now. I am just going to ask you to assume that this has been established—

“A—Yes.

“Q—I think that gets around your objection, because this is just a hypothetical question. If it were established as a fact that in October, 1938 plaintiff had showed that all of her reflexes were present, normal and equal on both sides, without any tremors or atrophies or hypertrophies, paralysis, anesthetics or paresthesias, would that fact, if established, tend to modify any of the opinions you have expressed here? If you like, you may just answer that yes or no, and then state in what respect it would tend to modify them.

“A—Yes, I think it would. I think it would tend to make me believe that there was more of the functional side, rather than of the organic side.

“Q—Is there a possibility that some of the symptoms that you observed could be hysterical, Doctor?

“A—Yes, that always is possible. [119]

“The Court: There is no testimony, that the court recalls, regarding an examiner. He stated that he is a physician and surgeon and specialized in orthopedics. Isn't that correct, Doctor?

“A—That is correct.

“Q—That establishes the fact, and I will withdraw the question, if I may, your Honor. You are experienced, are you not, Doctor, in the treatment of such injuries as the plaintiff here exhibits?

“A—Yes, sir.

(Deposition of Dr. Steele Stewart)

“Q—What treatment is indicated for her condition and what results would you expect from such treatment? That is a compound question, and I will split it up if you like.

“A—If you refer to the treatment from this moment on, or whether you mean the treatment of the case from its inception or—

“Q—No. I would like you to describe it in general, Doctor, if you will. Will you confine your views just to the treatment that may be indicated in the future and the probable results?

“A—In the first place, we have a spine which is injured and which is in poor position, and the use of her back throws a strain on that spine at every attempted use of the back. And under those circumstances it has been found in a considerable number of cases that the most relief is a joining together of the injured vertebra and a [120] tying to the injured vertebra of at least one normal vertebra on either side, so that that portion of the spine instead of moving, as a series of segments might move on one another, would then move as a block and take care of the many little strains that go in; and that very frequently gives a great deal of relief from the pain that the patient experiences, and also allows him much better use of the part than they would have in the condition that she is in at the present time.

“Q—And such a result, if it were achieved, would also have the effect, would it not, of relieving the leg symptoms, if they are partly hysterical in nature?

(Deposition of Dr. Steele Stewart)

"A—I never have seen that happen, although I have heard of it happening, as I have talked with other men about similar cases.

"Q—Those areas of the spine involved, those segments are down near what is known as the small of the back, are they not, Doctor?

"A—They constitute three-fifths of the small of the back.

"Q—Three-fifths of the small of the back?

"A—Yes, sir.

"Q—And these lumbar vertebrae are joined by another type of vertebra at the upper end, are they not?

"A—Yes, the type begins to change at that point.

"Q—And what are they called? [121]

"A—Thoracic or dorsal vertebrae.

"Q—And there are also vertebrae below those three lumbar vertebrae?

"A—There are two more lumbar vertebrae.

"Q—Then there are other vertebrae, in the sacrum?

"A—In the sacrum or the tail-bone.

"Q—Those sacro vertebrae do not require any movement at all, do they, Doctor?

"A—The sacrum is made up of a series of vertebrae, which are fused or joined together in fetal life—

"The Court: Has there been any testimony as to injury to those parts of the spine? If there hasn't, I don't think you should take up the time, Mr. Garrett.

(Deposition of Dr. Steele Stewart)

“Mr. Garrett: I beg your pardon, your Honor.

“The Court: Did you testify to any injury of it, Doctor?

“A—No.

“Q—With respect to the fusion of these lower vertebrae, does that continue into the lumbar vertebrae, to any great extent, in later life—normal later life?

“A—you mean the fusion that normally appears in the sacrum?

“Q—Yes.

“A—It may in part, and it may involve one completely at times, but that is rather rare.

“Q—Does normal activity require any movement of the [122] vertebrae affected in this patient?

“A—Yes, sir.

“Q—To what extent?

“A—It is essential, in that it makes possible the individual retaining their equilibrium. If you were a lover of dogs and watched a pup running along, you could see how his hind quarters wove back and forth with the various steps. Not being a doctor I don't suppose you have seen so many in the nude, so I didn't refer to a human, but that does happen in the human, that same sore of thing. It is part of the adjustment that we have that helps maintain equilibrium.

“Q—Would any particular limitation or disability for the tasks of everyday life result from the fusion of the

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first and second lumbar vertebrae, in the manner you have spoken of?

“A—The two points in the spine where most motion occurs, that is, that motion of the body, are the place where the lumbar vertebra joins the sacrum and at a point where the lumbar vertebrae join the thoracic vertebrae. You would have to catch the thoracic in a fusion and you would have to catch the lumbar, and that would eliminate one point of motion in the back; and any motion that required activity at that particular part would be hampered.”

Mr. Marcus: The next is redirect examination.

“Q—Doctor, when you say it might alleviate the patient [123] in the event some of these vertebrae were fused together, how would that be accomplished?

“A—By surgical procedure, you would have to go in and expose the whole back of the spine in that area. You would have to scrape out the cartilage between the various joints, in that case there would be ten small joints that would have to have cartilage removed from them, and you would have to introduce bone grafts, either taken from the spine itself, lapping one over the other, or take bone grafts from the shin, in order to get a solid piece of bone.

“Mr. Marcus: Thank you Doctor. That is all.” [124]

Los Angeles, California, January 5, 1944; 10.00 o'clock
A. M.

KARL POLLINGER,

a witness called by and on behalf of the plaintiff, having
been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: State your name, please.

A. Karl Pollinger.

Q. Mr. Pollinger, what is your business or occupation?
A. I am a circus performer.

Q. Do you have an act? A. Yes, sir.

Q. In the circus? A. Yes, I have.

Q. Were you employed by the Ringling Circus?

A. Yes, I was.

Q. And did you perform in the Ringling Bros. Circus?
A. Yes, I did.

Q. And did you, in 1937, go to San Diego with your wife?
A. Yes, I did.

Mr. Combs: Now, if the court please, all questions so far have been leading and suggestive. They have been preliminary, but I am fearful they will continue.

The Court: Proceed, Mr. Marcus.

Q. By Mr. Marcus: Are you acquainted with your wife's trapeze? [125] A. Yes, I am.

Q. Is it the trapeze that has been introduced in evidence here? A. Yes, the very same one.

Q. Did you ever witness your wife perform?

A. Yes, many times.

(Testimony of Karl Pollinger)

Q. Beginning with the performance in San Diego, and the itinerary from San Diego, will you describe to us what your wife did in the nature of her act?

A. She had a balancing act, which means standing on the trapeze, and not using her hands, and balancing her body on the bar.

Q. You heard her testimony, did you?

A. Yes, sir.

Q. That was substantially her act?

A. Yes, sir.

Mr. Combs: I object to that as a conclusion.

Mr. Marcus: I will withdraw it.

Q. Will you tell us whether or not you assisted your wife at all during her performance? A. No, sir.

Q. Did you do anything in connection with her act?

A. No, sir, I did not.

Q. Did you at any time during her itinerary come out with her? A. Yes, sir, I did. [126]

Q. Over what period of time?

A. About two months before the accident happened.

Q. About two months prior to the date of the accident?

A. Yes. I came out with her every day.

Q. And you continued for those two months until the date of the accident, did you?

A. Yes, sir.

Q. When did you appear with her? When did you come out with her?

A. I always came right behind her.

(Testimony of Karl Pollinger)

Q. Did you at any time come out before she came out?

A. No, sir.

Q. Tell us what you did when you came out with her?

A. When I came out with her I watched her until she took a bow. Then I went in front of the ring and helped one of the property men to pull her up to the trapeze. Immediately after that I went to the outside of the ring and held the rope until she was through with the first part of her act. Before the second part of the act there was an announcement. She was introduced by the announcer to the public as the only woman who performed this very act. At that moment I took the rope, and went to the center of the ring. She holds the rope with one hand and I start her swing about two times, then I took the very same rope and went to the outside of the ring, and hold it until she finished. When she finished some property men and I went to the ring and let her come down. [127]

The Court: Did you say you helped raise her?

A. Yes, I helped pull her up.

Q. When she first came out you helped pull her up?

A. Yes, your Honor.

Q. By Mr. Marcus: You say this procedure began about six weeks or two months before the accident?

A. Yes.

Q. Tell us how it was you began to do that.

A. Because many times the boys had tried to pull her up in the air, and a lot couldn't do it, and I went in myself to help to do so.

(Testimony of Karl Pollinger)

Q. It would be your responsibility to do that?

A. Yes, during the last six or seven weeks.

The Court: Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up.

Q. By Mr. Marcus: Will you explain what your duties were, and what your act was in the circus. Mr. Pollinger, what did your act involve, very briefly, please?

A. I had a big tower, like the French Eiffel Tower, and on top an airplane and three motors, and two persons were on it, and I picked it up with my shoulders and balanced.

Q. What did it weigh?

A. A little more than a thousand pounds.

Q. A little more than half a ton? [128]

A. Yes.

Q. You lifted that yourself? A. Yes.

Q. I presume there was no effort on your part to lift your wife? A. No, sir.

Mr. Combs: That is objected to. There was some effort, of course.

Q. By Mr. Marcus: Outside of helping your wife up on the rope, and give her rope a swing, as you testified, did you do anything else?

A. No, sir, I did not.

Q. Mr. Pollinger, during this itinerary did you observe anything in the ring at the time your wife performed?

A. It was the men standing there with the net.

(Testimony of Karl Pollinger)

Q. How many men were holding the net?

A. About eight.

Q. Mr. Pollinger, how long had you been engaged in circus work prior to the date of the accident?

A. About ten or fifteen years.

Q. Are you acquainted with the nature of nets, and their uses? A. Yes.

Q. Have you, during those years, witnessed different kinds of nets used in the circus?

A. Yes, sir, I witnessed all kinds of nets. [129]

Mr. Combs: I would like to object to the introduction of any evidence concerning a net, for the reasons stated in my objection to Miss Olvera's testimony.

The Court: Objection overruled.

Mr. Combs: May I ask that that objection may be deemed to go to this entire line in regard to the net?

Mr. Marcus: It is all right with me.

The Court: That will be satisfactory to the court. Proceed.

Q. By Mr. Marcus: Mr. Pollinger, what kind of net was being used by the Al G. Barnes Circus at the time? A. It was a movable net.

Q. How large is this net?

A. I would say, roughly, 8 x 10, or 10 x 10.

Q. Can you describe the net construction, please?

A. Yes, the net was of canvas, about 10 x 10 feet. Outside of this canvas is heavy rope, and this rope has some loops attached to it, and each man holds two loops in his hand, and watches the performer.

(Testimony of Karl Pollinger)

Q. You call that a movable net? A. Yes.

Q. Is any other kind of net used by the circus?

A. Yes, they use stationary nets.

Q. Describe the stationary net used by the circus.

A. There are all kinds of stationary nets.

The Court: It doesn't seem that we should go into a [130] description of other nets.

Q. By Mr. Marcus: Did you take any part in holding the nets at all? A. No, sir.

Q. Had you on any occasion taken any part in holding the net? A. No, sir.

Q. Who were these men who did?

A. The net men from the show.

Q. Did you pay them? A. No, I did not.

Q. Do you know who paid them for their services?

A. Yes.

Q. Who did? A. The show paid them.

Q. What did these men do besides hold the net, to your knowledge?

A. I wouldn't know just what kind of work they did.

Q. Did you ever see them render any services besides holding the net? A. No, sir.

Q. Do you remember the date of this accident?

A. I do.

Q. What date was it? A. November 12th.

The Court: What date? [131]

A. September 12th.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: September 12th of what year?

A. 1937.

Q. Where did it happen?

A. At Anthony, Kansas.

Q. Explain to the jury exactly what happened, from the moment that your wife came on.

A. On September 12, about around 4:00 o'clock in the afternoon my wife went into the ring. I was about three or four feet behind her. As soon as she stepped into the ring I went to the front and helped pull her up to the trapeze. Then she started to work. She worked the first part of her act. I stayed outside the ring, holding the rope, so she wasn't disturbed.

Q. How long did that take, the first part of her act?

A. Maybe two or three minutes. When she completed the first part of her act I came in with the rope and started her to swing. I gave her two swings, and then went over to the outside with the rope, and stood watching her. Then she tried standing up on the trapeze, putting the left foot forward, and then the right. She put out her left foot when about the center of the bar. When she came to the center of the bar she put up her right foot, and stood up. She completed standing up, and in that moment something snapped, and the trapeze threw her out in front.

Q. Did you hear a noise at that time? [132]

A. Yes, sir, I did.

Q. What kind of a noise was it?

A. A sharp metallic noise, like something broke.

Q. You remember the sound of that noise?

(Testimony of Karl Pollinger)

A. I always will remember.

Q. At that time, when the accident happened, had the band stopped playing?

A. After her first part of the act, there came the announcement. There was no noise at all.

Mr. Combs: I object to leading and suggestive questions.

The Court: Yes, counsel should avoid leading.

A. There was no band playing. It was very quiet in the show, because they expected to see something extraordinary.

Q. By Mr. Marcus: Would you recognize the sound that you heard at that time?

A. Yes, I certainly would.

Mr. Combs: At this point, we object to the attempt of counsel to indicate the noise by rattling the bar, upon the ground that it is too remote, and has no connection with the circumstances surrounding the particular moment.

The Court: The objection is good.

Mr. Marcus: I will attempt to lay a further foundation.

Q. Tell us whether at that time there were any noises, to your knowledge, in the tent.

A. Definitely no noises at all.

Q. What was the condition there at that time with [133] respect to sound or noise?

Mr. Combs: That is objected to as calling for the conclusion of the witness.

Mr. Marcus: The witness can testify whether there was any noise.

(Testimony of Karl Pollinger)

The Court: Yes, he can testify as to whether it was quiet.

A. She started to do her last trick, and after the announcer finished announcing her at that moment everybody expected something, and glued their eyes to the center of the ring where the performer was working.

Q. By Mr. Marcus: Were any other acts being performed at that moment?

A. No, sir, she was the only one in the show.

Q. After this announcement that was made did the band start playing? A. Yes, sir.

Mr. Combs: I again ask that leading and suggestive questions be refrained from.

The Court: I don't think that is directing his attention to a particular thing.

Mr. Combs: I don't care about that, particularly.

The Court: Proceed.

Q. By Mr. Marcus: Now, can you tell us whether or not you heard any noise?

The Court: He has already said he heard a metallic [134] noise; something striking metal.

Q. By Mr. Marcus: Do you know where that noise came from? A. Definitely, yes.

Q. Where did it come from?

A. Right from the trapeze.

Q. Do you know what part of the trapeze it came from? A. Yes.

Mr. Combs: May I ask a question on voir dire?

The Court: Yes.

(Testimony of Karl Pollinger)

Q. By Mr. Combs: Mr. Pollinger, did you observe the trapeze at the time the noise occurred?

A. At the time the noise occurred I had the rope in my hand, and the noise, and all the vibration from the guy lines came at the same moment together.

Q. Whereabouts were you looking at that particular moment? A. At my wife.

Q. On the trapeze bar? A. Yes.

Q. You were not looking at the crane bar?

A. No, I had the guy line in my hand.

Q. At the time the noise occurred you did not see the crane bar? A. No, I did not.

Q. By Mr. Marcus: Where did the noise come from?

Mr. Combs: I object to that as calling for the con- [135] clusion of the witness.

Mr. Marcus: I submit he would not have to look at a place to know where the noise came from.

The Court: Objection sustained.

Q. By Mr. Marcus: Could you tell from what part of the tent the noise came?

Mr. Combs: Same objection.

The Court: Overruled. You may answer.

A. The noise came right from the main trapeze, and all four guy lines were shaking, like it went out of place.

Mr. Combs: May I ask that the answer be stricken?

The Court: It may go out as a voluntary answer.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did you observe the lower bar as you came in with your wife? A. Yes, I did.

Q. What was the condition of it at that time?

A. In perfect level condition.

Q. Tell us whether at that time you could see any other part of the trapeze?

A. I just looked at the trapeze bar.

Q. After your wife fell did you see the lower bar?

A. Yes, I did.

Q. When was that?

A. When my wife fell—may I explain, your Honor?

The Court: Just answer the question; when.

A. Shortly after I carried my wife out. [136]

Q. By Mr. Marcus: How long was that after the accident?

A. About a second. When my wife fell down I pretty near caught her before she fell to the ground. I rushed out immediately.

Q. What did you do when you saw her fall?

A. I picked her up immediately and ran out with her.

Q. Did you see the men with the net standing there?

A. They still stood there when I went outside of the ring.

Q. Did you see them standing there?

A. Yes.

(Testimony of Karl Pollinger)

Q. Did the men holding the net move at any time before your wife fell from the trapeze, until she struck the ground?

A. No, sir, most of them did not even observe she fell down.

Q. Answer the question: Did they move at any time from the moment your wife fell from the trapeze until she struck the ground?

A. No, they didn't.

Q. Did you move?

A. Yes, I did.

Q. What did you do?

A. I ran to catch my wife.

Q. How far were you, at the moment she struck the ground?

A. When I see her fall down I was about ten or fifteen feet, and the moment she struck the ground I was about two [137] feet away from her.

Q. Did she do anything, or did anything happen on the way down?

A. Yes, she fell face forward. She tried to hold herself, but she couldn't because the trapeze bar went back so fast, so she turned a somersault to save her face.

Q. How did she do that?

A. It means reaching for both legs with both hands.

Q. Demonstrate to the jury.

A. Like this, pulling her body close together.

Q. Did you see your wife strike the ground?

A. Yes, I did.

Q. Did she strike anything on the way down?

A. One of the property boys.

(Testimony of Karl Pollinger)

Q. Did your wife make any statement at the moment the accident happened?

A. The moment she fell down she was screaming "Look at the trapeze," but I didn't look at no trapeze. I took her in my arm and carried her out.

Q. Where did you carry her to?

A. I carried her outside of the ring where the tubs from the elephants are, two or three of them, and she told me, "Let me down. Drop me down." So I put her on one of those tubs and supported her back with my hand. At that moment she pointed to the trapeze and said, "Look at the trapeze." The trapeze was swinging. [138]

Q. Did you look at that time?

A. Yes, I did.

Q. What did you observe about the trapeze at that time?

A. Well, one side was about five or six inches down lower than the other side.

The Court: Read the answer.

(Answer read by the reporter.)

Q. By Mr. Marcus: Then what did you do?

A. Then I carried her out and some man helped me carry her out.

Q. Who helped you?

A. The Indian Chief. We formed a kind of bridge with our hands. I held with the right hand, and the left hand I supported her back, because I could feel a lump.

(Testimony of Karl Pollinger)

Q. Did you see any other injury to her body at that time? A. Yes.

Q. What did you see?

A. One elbow was out of place; the bone stuck out.

Q. Stuck out where? A. Out of the elbow.

Q. Sticking through the skin? A. Yes.

Q. Was she bleeding in any part of the body?

A. Very little, from the arm.

Q. Any other part of the body? A. No. [139]

Q. Did your wife lose consciousness at any time that you observed? A. No.

Q. Then where did you take her?

A. Outside of the doctor's tent. We had a doctor in the show. At the same moment we came out there was a doctor from town, and she told him, "Please put my arm in place." The doctor from town tried to put the arm in place. She told him how to do it; she said "Put your foot under my shoulder and let it go back." He tried several times, but couldn't do it. My wife asked me to please help. I couldn't do it.

Q. How long did she remain in the hospital at Anthony, Kansas? A. About a week.

Q. Did you remain with her? A. Yes, I did.

Q. Mr. Pollinger, did your wife perform in your act?

A. Yes, she did.

Q. What did she do in connection with your act?

A. She worked in the part where the airplane was; made some aerial exercises.

(Testimony of Karl Pollinger)

Q. In connection with doing her act, can you tell when you did your act?

A. My act was immediately after hers.

Q. I presume you did not perform that day? [140]

A. I did not.

Q. How long afterward was it that you did not perform? A. I was out quite some weeks.

Q. Your wife remained in the hospital approximately a week, you stated? A. Yes, sir.

Q. Then what happened?

A. When we were in the hospital the doctor from the hospital gave her some medicine to stop the pain; she took it constantly, and it made her more comfortable. She said, "I want to go with you," so I took her to Amarillo, Texas, where the show was located at that time. I rented a place, and we lived there about two or three weeks while the show was in town.

Q. During that time you did not perform either, did you? A. No, sir.

Q. Has your wife to your knowledge at any time since the date of the accident performed in any circus?

A. No, sir, she did not.

Q. Has she worked at all to your knowledge?

A. No, but she attempted one time to practice in the winter quarters.

Q. Where were the winter quarters?

A. The winter quarters are in Baldwin Park. It was, I imagine, around February, after her accident.

(Testimony of Karl Pollinger)

Q. She tried to perform her act? [141]

A. She tried to go up on the trapeze. We tied her with all kinds of rope, and pulled her up.

Q. She tried to do her act? A. Yes.

Q. What happened?

A. She couldn't even stand on her feet. As soon as we released the rope she hollered "Let me down."

Q. Do you know if she ever made an effort to go on the trapeze again? A. No, sir, she did not.

Q. When you left Amarillo, Texas, how did you travel with your wife?

A. Travelled in our place. In the show we had a compartment in the Pullman car, a place where she slept, and under doctor's orders I had fixed some boards in order that she did not move while the train was in motion. That was where she remained several weeks.

Q. Travelling in the train? A. Yes.

Q. You reached Baldwin Park?

A. Yes, we did.

Q. How long did you remain there?

A. In Baldwin Park?

Q. Yes. A. About April, 1938.

Q. Was your wife able, after the accident, while you [142] were living in Baldwin Park, to perform her household duties? A. No, sir.

Mr. Combs: I ask that the answer go out, and object to it as calling for the conclusion of the witness.

The Court: That may go out.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did she do any household work?

A. She was—

The Court: No, just answer the question.

A. No, sir, she did not.

Q. By Mr. Marcus: Did you do the household work?

A. Yes, I did.

Q. Have you gone back to the circus?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

Mr. Marcus: I will reframe it: Have you done any work for the circus since the time of your wife's accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: When did your wife first begin to walk, after the accident?

A. I can't state clearly what time, but she always tried—

The Court: That is not the question.

Q. By Mr. Marcus: Do you remember when it was she first tried to walk? [143]

A. While we were in Baldwin Park.

Q. Has she at any time since the date of the accident been able to walk without crutches, to your knowledge?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: Sustained.

(Testimony of Karl Pollinger)

Q. By Mr. Marcus: Did she at any time to your knowledge, since the date of the accident, walk without crutches? A. No.

Q. That has been during the past seven years, has it not? A. Yes.

Mr. Marcus: You may cross examine.

The Court: The court will now take a recess. During this recess the jury will bear in mind the admonitions of the court.

(Short recess.)

(Stipulated that the jurors are all present and in their places.)

Cross Examination

Q. By Mr. Combs: Mr. Pollinger, you were present about a year ago when I was up there at your home in connection with the matter involving Ruby Olvera?

A. Yes.

Q. Isn't it true that at that time your wife was walking without crutches, walked across the entire lot without [144] crutches, without taking the hand of that little girl? A. No, sir, it isn't true.

Q. Isn't it true that your wife walked without crutches at the trial of that guardianship matter, down at Long Beach?

Mr. Marcus: That is an absolute misstatement of the fact.

Mr. Combs: (To plaintiff) What did you say, Miss Olvera? You swore at me, didn't you?

(Testimony of Karl Pollinger)

The Court: I don't care for any such conversation here. I did not hear it, and it is not part of the record. Proceed. You have a right to ask him if she walked.

Mr. Combs: Will the witness answer the question?

A. No, she did not walk without crutches.

Q. Mr. Pollinger, you are a very fast runner, are you not? A. Not a particularly fast runner.

Q. Just about an ordinary runner?

A. Yes, sir.

Q. You are familiar with the rule of physics that a falling body falls sixteen feet the first second, and thirty-two feet the second?

Mr. Marcus: I object to that as assuming facts not in evidence, and calling for a conclusion.

The Court: He just asked him if he was.

Q. By Mr. Combs: Are you familiar with that rule of [145] physics?

A. Yes, I am fairly familiar with that rule of physics.

Q. How high was the trapeze bar from which America fell?

A. Let us say from 20 to 25 feet.

Q. Can you put it exact, at 20 feet?

A. I do not have a ruler to measure it. I would be very careful to make the statement.

Q. Your wife testified 22 feet. Is that approximately right? A. Yes, approximately.

Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

(Testimony of Karl Pollinger)

The Court: I don't think you need answer that question. It is a rule of physics.

Mr. Combs: I will figure it out, your Honor. I think it is a fact of which the jury takes judicial notice; the court and jury.

Q. You ran the distance from a point 10 or 15 feet away to a point within two feet of your wife?

A. Yes.

Q. While she was falling? A. Yes, I did.

Q. You started running the instant you saw her start falling? A. Yes.

Q. What did you do, drop the rope, and start running? [146]

A. Honest to God, I don't know what I did.

The Court: Don't use an expression of that kind in court.

A. I don't know what I did with the rope.

Q. By Mr. Combs: You don't know a thing other than you covered the distance from a point 10 or 15 feet away to a point 22 feet, while your wife was in the air?

A. Yes.

Q. And you started after she fell?

A. Yes, that is correct.

Q. Do you know how far you can run a second?

A. Yes.

Q. How far can you run a second?

A. It all depends. You can jump 10 feet in one second, but you couldn't run 10 feet maybe in one second.

(Testimony of Karl Pollinger)

Q. You mean you can jump faster than you can run, is that it?

The Court: Don't argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court.

Q. By Mr. Combs: You are able to testify that you can jump 10 feet in one second?

A. Yes, I am.

Q. From a level straight away?

A. I don't know which distance—[147]

Q. Are you talking about jumping down, up, or jumping on the level?

A. May I explain something?

Q. I would like to have that explained.

A. Yes. I stood outside of the ring, and had one foot resting on the ring itself the moment I saw my wife falling. You couldn't apply the law of physics to a living body. It would be incorrect.

Q. Why?

A. Because a living body changes in every point constantly. My wife in that case made a complete somersault to avoid falling on her face, which takes considerable time to do so. From the moment she was out of balance she stood maybe a second and a half on the trapeze before she fell from the trapeze.

Q. She lost her balance? A. Yes.

Q. You saw that occur? A. Yes.

(Testimony of Karl Pollinger)

Q. Then you saw her stand there a second and a half?

A. I don't know how long; she was trying to keep herself up in the air. That was just natural.

Q. Did she hang onto the side of the trapeze?

A. She tried to touch it with her hand.

Q. But she was unsuccessful? A. Yes. [148]

Q. I thought you said she doubled up?

A. That is what she did when she left the trapeze.

Q. She first tried to hold on? A. Yes.

Q. Then she doubled up? A. Yes.

Q. You say it took her longer to fall from the moment she started falling than the rule of physics requires?

A. Yes.

Q. How much longer?

A. Probably double the time.

Q. In other words, instead of falling 16 feet the first second, she fell only 8 feet the first second?

A. I wouldn't be able to put it in that form.

Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Don't answer that. The court will limit the cross examination on that point.

Q. By Mr. Combs: During that period of time you ran or jumped—did you say jumped? A. Yes.

Q. You jump faster than you run?

A. Yes, I do.

Q. You jumped from a standing start?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. You started to jump at just what instant? [149]

A. At the very moment I saw her and something was wrong.

Q. When did you first start to jump?

A. At the very same moment when I saw her being in danger.

Q. You saw her doing what?

A. Doing her last trick, standing up on the trapeze.

Q. I am getting at the time when you began your standing broad jump. That occurred, you say, at the instant when she started to fall out of the trapeze?

A. When I heard the noise.

Q. When you heard the noise? A. Yes.

Q. That is when you jumped?

A. That is when I jumped; when I saw in the same moment—I heard and saw the same moment, because I was looking at her.

Q. Do you know what the diameter of the center ring in that circus is?

A. I would say about 30 or 35 feet.

Q. It is 36 feet, isn't it?

A. I wouldn't know that. I never measured it.

Q. America's act was in the immediate center of the ring; that is, the trapeze was hung in the immediate center, wasn't it?

A. Even that I couldn't swear to.

The Court: It was in the approximate center, wasn't it?

A. It was in the approximate center, your Honor. [150]

(Testimony of Karl Pollinger)

Q. By Mr. Combs: She fell. Let us find out now how far from the point of the center of the ring was the point where her body hit when she fell?

A. I don't know how many feet.

Q. Have you any idea?

A. I just know I made the jump. I figure it was about from the ring 6 or 7 feet.

Q. Six or seven feet from the ring? A. Yes.

Q. The net was in the center ring, in the exact center, with the center of the net under the trapeze, wasn't it?

A. I couldn't say if it were a little bit more in front of the ring, or a little bit more to the back. I believe a little bit more in front.

Q. The front was the side you were on?

A. Yes.

Q. How much to the front do you believe it was, in feet? A. I couldn't say.

Q. One foot?

A. It could be a foot; it could be four feet.

Q. In relation to the net she fell out of the point that was immediately below the front part of the trapeze, didn't she?

A. She fell right on the side of a man who was back of me.

Q. This man—it was one man, I take it? [151]

A. One man.

Q. She struck him in the back?

A. Yes, about on the hip.

(Testimony of Karl Pollinger)

Q. That man was holding the end of the net, is that right?
A. Yes, sir.

Q. So she fell approximately on the line where the trapeze swung in relation to the net, didn't she?

A. Yes.

Q. Where did you stand in relation to the ring?

A. I was on the left outside guy line.

Q. How long is that outside guy line?

A. They are different.

Q. Are you referring to the guy line that was on the trapeze itself?
A. Yes.

Q. That guy line is not here in evidence, is it?

A. It is here.

Q. Are you sure it is?

A. Sure; we brought it in.

Q. How long was the guy line?

A. May I explain something?

Q. Please answer the question.

The Court: He asked you how long it was.

A. I don't know, your Honor, how long the guy line was. Maybe 30 feet; it could be even 40 feet. [152]

Q. By Mr. Combs: How long was the line you held and swung, on that day?

A. The line went outside.

The Court: He just asked how long it was.

A. 30 or 40 feet.

Q. By Mr. Combs: You held that taut or tight during the entire performance, didn't you?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. And that line swung from the crane bar?

A. Yes.

Q. Which side of the crane bar?

A. From my side, where I was standing; the left side.

Q. Would you state again how long that line that you were holding was.

The Court: He said 30 or 40 feet.

Mr. Combs: I want to get the hypotenuse of that right triangle.

Q. How high was the crane bar from the ground?

A. The crane bar was from the ground the same length as the hooks, the ropes. The ropes were identical with the height.

The Court: No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately.

A. About 35 feet.

Q. By Mr. Combs: Do you know how far from the top of the [153] tent the crane bar was?

A. Right to it.

Q. Right up to the top of the tent?

A. Yes, sir.

Q. Are you able to state with any degree of definiteness the approximate spot, from the point where the trapeze hung down, if it were hanging perpendicularly and motionless, that your wife struck the ground?

(Testimony of Karl Pollinger)

Q. By the Court: You say the crane bar was right up at the top of the tent?

A. Yes, your Honor.

Q. About how far from the top?

A. I would say to the extreme top maybe three feet; something like that.

The Court: Read the question which was unanswered, Mr. Dewing.

(Question read by the reporter.)

Q. By Mr. Combs: Can you state that? You understand the question?

A. Yes, I do.

Q. All right. A. Maybe seven feet.

The Court: Read the question, Mr. Dewing, and the answer.

(Record read by the reporter.)

The Court: Seven feet from what?

Mr. Combs: My question was from a prolongation from the [154] point where the trapeze hung motionless, on the ground.

The Court: It was seven feet from such a point, is that what you meant?

A. Yes, your Honor.

Q. By Mr. Combs: You actually held this rope that she used to ascend with, and you used to accelerate that swing yourself with, taut during the entire performance?

A. I held it on the outside.

Q. During the entire performance?

A. Yes.

Q. And watched your wife during the entire performance?

A. Yes, I did.

(Testimony of Karl Pollinger)

Q. Do you know when the apparatus was erected or put up in the tent? A. No.

Q. You never knew that? A. No.

Q. Did you ever inspect the apparatus before your wife performed? A. No, I never did.

Q. Not at all? A. No, not at all.

Q. Didn't you complain to the circus, on a prior occasion, about the manner in which your wife's apparatus was erected? A. Yes, I did. [155]

Q. How did that come to your knowledge then?

A. Because one day when I walked into the ring and pulled my wife up on the trapeze, I went outside to the stake, and I saw the stake come out of the ground.

Q. Another time the trapeze was tangled up?

A. Yes.

Q. You complained on that occasion?

A. Yes, I did.

Q. Did you always examine to see if the trapeze was in position? A. How could I examine it?

The Court: Just answer the question.

A. No, I did not.

Q. By Mr. Combs: I take it on this particular occasion you did not examine it?

A. No, I did not.

Q. And on this particular occasion you did not look at the crane bar? A. No, I did not.

Q. In fact, the first time you ever looked at the crane bar in this matter was after you sat your wife down on the elephant tubs, is that right?

A. No, I did not even then.

(Testimony of Karl Pollinger)

Q. You did not even look at that time?

A. No.

Q. In fact, you never looked at the crane bar in this [156] situation?

A. No, I did not. May I explain?

The Court: If you care to explain what you mean.

A. I did not look at the crane bar, because the crane bar was between the flying act apparatus and I couldn't see it.

Q. By Mr. Combs: You could have looked at it if you attempted to look at it?

A. I could go inside of the ring and look up this way.

Q. You did not do that?

A. I couldn't do it during the performance.

Q. Just a minute. You didn't do it?

A. No, I did not.

Q. You watched your wife during the entire part of her performance, I presume, did you not?

A. Yes, I did.

Q. You did not observe anything unusual about the manner in which the trapeze bar swung, did you?

A. No.

Q. It swung equal and level on every swing, both forward and back and sideways, is that right?

A. Yes.

Q. Do you know when the apparatus on the 12th of September was taken down?

A. Yes, I know.

(Testimony of Karl Pollinger)

Q. When was it taken down? [157]

A. Right immediately after I carried my wife out, I heard the noise from the apparatus coming down.

Q. It was taken down immediately after the accident then, was it? A. Yes.

Q. Do you know who took it down?

A. The property men.

Q. Who are they?

A. I don't know them by name.

Q. Did you make any payments to the men who worked on your wife's rigging?

A. No, I did not.

Q. I will ask you whether or not you testified in the former trial in this matter, about January 16, 1940?

A. I did.

The Court: Were you a witness in the other case?

A. Yes, I was.

The Court: In the other trial, I should say.

A. Yes, your Honor.

Mr. Combs: Will you stipulate that the following testimony was given by this witness at the former trial, under oath, is that correct, counsel?

Mr. Marcus: This was his testimony under cross examination.

Mr. Combs: That is right.

Mr. Marcus: For what it is worth, your Honor. [158]

Mr. Combs: Everything is for what it is worth.

The Court: That statement is unnecessary.

(Testimony of Karl Pollinger)

“Q—By Mr. Garrett: Mr. Pollinger, how did you know that these particular men were attending to your wife’s rigging?

“A—I did know it, because there wasn’t any other riggers on the show.

“Q—Who were they employed by?

“A—Beg your pardon?

“Q—Who were these men employed by, if you know?

“A—They were employed by the show.

“Q—Did you pay any of them anything for attending to your wife’s rigging?

“A—Usually we give every week some tips to everyone who helps. I did also, too.

“Q—You made those payments to those men that worked on your wife’s rigging?

“A—To everyone, if they worked or not.

“Q—Did you make such payments to the men that worked on your wife’s rigging?

“A—I gave every week some money to the men that was on my rigging, and I am not sure whether I give some money to everybody that was on her rigging, because they might work on both.

“Q—You made those payments to all the riggers, is that right? [159]

“A—Yes.”

Mr. Combs: That is all.

Redirect Examination

Q. By Mr. Marcus: Mr. Pollinger, were there any other riggings in the net at the time that you came out with your wife? A. Yes, there were.

(Testimony of Karl Pollinger)

Q. Tell the jury what other riggings were in the tent.

A. There was one trapeze on the left side, and one on the right side, and one in the center, which belonged to my wife.

Q. Were any of the wires or any of the guy ropes attached to some pole over near the same proximity that your wife's wires and riggings were attached?

A. Not near to it.

Q. How far? A. The next pole.

Q. How far away was that?

A. About 25 feet.

Q. Were there any other wires attached to the same pole that your wife's rigging was attached?

A. Yes, many.

Q. What other wires and rigging were there attached to the same pole?

A. Well, there was attached for the net which protected the lion tamer, and there was the rigging from the flying act, [160] and some spotlights in the center.

Q. Were there any wires from the tent itself, to hold up the tent, on that pole?

A. Yes, there was.

Q. About how many were there all together on that same pole that your wife's rigging was attached?

A. Quite many. It is hard to say how many.

Q. What other trapeze was hanging from the main pole?

A. The trapeze from the flying act.

(Testimony of Karl Pollinger)

Q. That was fastened to the main pole?

A. Yes.

Q. What was the position of the top of the tent with reference to the crane bar, the top bar of your wife's rigging?

A. The top of the tent consisted of several layers of canvas, and it was very close together, about at an angle, about 50 degrees, and it was very dark.

Q. You mean by 50 degrees that the top of the tent comes up to an angle like this? A. Yes.

Q. Indicating an angle of about 50 degrees.

Mr. Combs: I ask that the answer "very dark" be stricken as not responsive.

Mr. Marcus: It may go out.

The Court: Yes, it may go out.

Q. By Mr. Marcus: Explain what you mean by the angle of the tent. [161]

A. It goes about 50 degrees to the top, and the top is supported from a very heavy rope connected with each pole of the tent.

Q. What was the condition of the light at the top of the tent where the crane bar was, or in that area?

A. There is no light in the top.

Q. Were there any lights on at the time that your wife performed? A. No, sir, there wasn't.

Q. From the position that you were standing, when you came in there, were you able to see the crane bar and the 8 hooks, where you were? A. No.

Mr. Combs: Just a minute. Can the answer go out, so I can make my objection?

(Testimony of Karl Pollinger)

The Court: You may make your objection.

Mr. Combs: Your Honor, I object to the question as calling for the conclusion of the witness. What he was able to do is for the jury to determine. What he did is what he may testify to.

The Court: It may go out.

Q. By Mr. Marcus: What did you do at the time that you came out?

A. I walked in front with my wife, and helped pull her up to the trapeze.

Q. Did you at that time look up? [162]

A. No, I couldn't see it.

Q. I say, did you look up? A. No, sir.

Q. Had you looked up on previous occasions?

A. No, sir.

Q. Did you see the lower bar?

A. Yes, I did.

Q. Did you see the crane bar?

A. No, I did not.

Q. Why couldn't you see the crane bar?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: He did not look up, Mr. Marcus; there is nothing to indicate he would know.

Mr. Marcus: Very well.

Q. Now, Mr. Pollinger, Mr. Combs has asked you questions before, on cross examination, that he came to your home last year to see your wife and yourself.

(Testimony of Karl Pollinger)

The Court: Before you answer that, I want to ask one question myself of Mr. Pollinger.

A. Yes, your Honor.

Q. By the Court: With reference to the money that you gave to the riggers, did you pay them their salary or their wages? A. No, your Honor, I did not.

Q. I believe you stated they were employed by the circus? [163] A. Yes, your Honor.

Q. By Mr. Marcus: I believe you also testified that these were tips that you gave them.

Mr. Combs: I respectfully submit that question has been asked and answered several times. Had counsel asked the question the court asked I would have no objection to it.

The Court: Mr. Combs, I want you to feel free to object to any question the court asks, because I asked what I thought was a pertinent question, but any time any counsel should feel they should object to any questions of the court they should do so, just the same as though other counsel had asked it.

Mr. Combs: Thank you, your Honor.

Mr. Marcus: I will withdraw that question.

Q. Will you tell the jury what happened at the time that Mr. Combs came out to see you?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

Mr. Marcus: Counsel himself opened it up, and stated he came there in connection—

Mr. Combs: I withdraw the objection.

(Testimony of Karl Pollinger)

The Court: You may answer.

A. Mr. Combs has tried to take my little niece away from my wife's home. If I hadn't come he would have succeeded.

The Court: What is the response?

(Record read by the reporter.) [164]

The Court: Strike it out.

Mr. Combs: If it is necessary for me to take the witness stand and deny that unmitigated falsehood I will.

The Court: It is ordered stricken out, and the jury instructed to disregard it. It has no place in this trial. If it comes to the matter of Miss Olvera walking, that is the only point that would be of any importance in this trial. If you want to question the witness with regard to that, you may do so.

Q. By Mr. Marcus: What did Mr. Combs do at the time that he came out, in connection with your niece?

The Court: Mr. Marcus, does that have to do with the alleged walking of Miss Olvera?

Mr. Marcus: It does, your Honor. I can tell the court it does.

Mr. Combs: I want to make a statement here. This has gone far enough on that score.

Mr. Marcus: If it has, it is on account of counsel's fault.

The Court: Wait until Mr. Combs has finished.

Mr. Combs: There was a guardianship proceeding pending concerning the niece of Miss Olvera. I was unable to locate the ward—

The Court: Let the court interrupt you, and if you think the court's statement is not sufficient, you may pro-

(Testimony of Karl Pollinger)

ceed further. You have made a definite statement to the jury that [165] you went there about a legitimate part of your work, and that you did not go there for any purpose regarding this case.

Mr. Combs: That is correct.

The Court: The only thing that could be of importance, and the court is not going to take up very much time on it, is whether or not Miss Olvera was able to walk. Mr. Pollinger has testified that she was not able to walk, except with the aid of crutches. Mr. Combs asked some questions indicating on that occasion she walked across the lot without the aid of her crutches. That is the only question of any importance, Mr. Marcus. I want you to keep that in mind, and if it is anything outside of that it is not of any importance, and the court will not take time with it.

Mr. Marcus: I would like to have counsel approach the bench with me.

(Discussion outside of the hearing of the jury.)

Q. By Mr. Marcus: At the time that Mr. Combs came to your home did your wife, to your knowledge, walk without her crutch or crutches?

A. No, sir, she did not.

Mr. Marcus: I believe there was a question asked as to whether or not Miss Olvera walked without her crutches in court at Long Beach, am I correct?

The Court: The answer was no.

Mr. Marcus: That is all.

Mr. Combs: No further examination of this witness. [166]

JOE AMERICA YACOPI,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: What is your full name?

A. Joe America Yacopi.

Q. Mr. Yacopi, what has been your business or occupation during your entire life?

A. Trapeze acrobat and pole artist.

Q. Where were you born?

A. South America.

Q. And you are from the Argentine?

A. Yes, that's right.

Q. What is that troupe composed of,—how many?

A. Eight.

Q. You have a little difficulty with the English language?

A. Yes.

Q. If there are some questions you don't understand, or I don't make it clear, stop me if you don't understand them.

A. Yes.

Q. How many composed your troupe?

A. Eight.

Q. Who were they?

A. My sisters and brothers.

Q. What sort of an act did you engage in with your [167] sisters and brothers?

A. Springboard act.

(Testimony of Joe America Yacopi)

Q. Explain briefly what it was.

A. There was a board, and a fellow jumped on a pedestal 30 feet high on the springboard, and did a quadruple somersault.

Q. He did a quadruple somersault in the air?

A. Yes.

Q. Did you ever do any trapeze work?

A. Yes.

Q. What kind of trapeze work?

A. I did single trapeze, and I did double trapeze.

Q. Your troupe, and the work that you did, was the only kind in the world? A. Yes, sir.

Mr. Combs: That is objected to as calling for the conclusion of the witness.

The Court: It has been answered.

Q. By Mr. Marcus: Were you ever employed by the Ringling Brothers? A. Sure, yes, sir.

Q. When? A. Since 1926.

Q. You are not employed by them now, are you?

A. No, sir.

Q. What have you done in the past two years? [168]

A. I was in the Army, sir.

Q. You were in the Army? A. Yes.

Q. You have just been discharged, have you?

A. Yes, sir.

Q. When was the last time that you did any trapeze work?

A. In Canada, and fairs in South America.

(Testimony of Joe America Yacopi)

Q. When was the last time you did any trapeze work?

A. It was in Canada, and in South America.

Q. When was the last time that you did any trapeze work?

A. It was in Canada.

Q. How long ago?

A. Before I went with the Ringling show.

Q. When was the last time you did any work in connection with the troupe?

A. In the Ringling show.

Q. How long ago was that? A. 1926.

Q. When was the last time that you did any work with the Ringling show?

The Court: He said 1926.

A. I beg your pardon. That was the last time I got into show.

Q. By Mr. Marcus: If you don't understand, stop me. When was the last time you actually worked in the circus?

A. The last time was about—I don't quite remember. [169]

Q. How many years ago, about?

A. I have been 14 years with the Ringling show.

Q. You went in 1926? A. Yes.

Q. So that would make it about 1940?

A. Yes, 1940 to 1942 I was in the Army.

Q. Were you with the Ringling show when America Olvera was there? A. Yes.

(The court after admonishing the jury here took an adjournment until 2:00 o'clock p. m. of the same day.) [170]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors were all present and in the box.)

JOE AMERICA YACOPI,

recalled.

Direct Examination

resumed.

Q. By Mr. Marcus: Now, in the year 1937, where were you employed?

A. With the Ringling shows.

Q. Was Miss America with the Ringling shows that year?

A. No, sir.

Q. Where was the Ringling show about September 12 of 1937?

A. I can't tell exactly the town it was. I don't remember.

Q. What State, if you remember?

A. I think it was Missouri.

Q. You believe it was Missouri?

A. Yes.

Q. Were you working on that date?

A. No, sir.

Q. What was the reason that you were not working?

A. The reason I was sick. I was discharged from the doctor.

Q. What did you do on September 12, 1937? [171]

A. September 12, 1937 I had a few weeks I was not doing anything.

(Testimony of Joe America Yacopi)

Q. I will ask you this question, and withdraw the last one: Did you see the accident?

A. Yes, I did.

Q. Where did it happen?

A. In Kansas; somewhere in Kansas.

Q. On or about that day were you traveling with the Ringling Bros. shows? A. Yes, sir.

Q. How did you go over to the show where Miss Olvera was working?

A. I took a taxi, a private taxi. It was a small town. I took it there, to go there.

Q. What did you do? A. I went to the show.

Q. What show? A. The Barnum show.

Q. How far away was the Ringling show, if you remember, from where the Barnum show was playing?

A. Around 40 or 45 miles; I don't know exactly.

Q. When you got there, did you know at the time that Pat Valdo was there too, at the Barnes show?

A. I knew about Pat Valdo. He went with us when we went.

Q. The same day? [172]

A. Yes, and Mrs. Bradna and I think Mickey Gray was together.

Q. Those were people in the Ringling show?

A. Yes.

Q. Who was Pat Valdo?

A. At that time Pat Valdo was director in the show; the boss; took charge of everything in the show.

(Testimony of Joe America Yacopi)

Q. He was boss of what show?

A. Ringling Bros. and Barnum both.

Mr. Combs: I object to that as calling for the conclusion of the witness, and ask that the answer be stricken. He says he was boss of Ringling and Barnum shows too. That was not the fact. It is not so disclosed by the evidence. This man is not capable of testifying to that fact.

Mr. Marcus: If he knows.

The Court: I think under such circumstances as this, where it is not a point in issue, he might make the statement, although it is just a preliminary matter. Viewed in that light only, it may be received. Mr. Combs, there is a case, Winslow vs. Glendale Light & Power Corporation, 164 Cal., which I think is just on that point. If this were an important part of the testimony, to establish the relationship of the manager, then your objection would be good. If it is just a preliminary matter, I would say it is not.

Mr. Combs: The only thing is, if the answer as to the [173] Barnes show stands, that leaves some evidence of that fact. This witness is not qualified to testify.

The Court: If you think it is important, the court will sustain your objection. It may go out.

Mr. Combs: I want to be cautious.

Q. By Mr. Marcus: What time did you arrive at the Barnes show, in Anthony, Kansas?

A. I was late. I got in there around 3:00 o'clock.

Q. Did you go to the show? A. Yes, sir.

(Testimony of Joe America Yacopi)

Q. Where did you sit?

A. I sat in the grandstand chairs, reserved chairs, in other words.

Q. What was on at the time?

A. I think it was the clown act; clown number.

Q. What followed the clown number, if you remember?

A. Exactly I don't remember. I think wire-walking.

Q. Some wire-walking? A. Yes, sir.

Q. When you came in the show did you see Miss Olvera's trapeze, or the trapeze that she later performed upon? A. Well, I don't see the trapeze.

Q. Just before Miss Olvera came on did you see anything done to her trapeze? A. Yes, I did.

Q. What was done? [174]

A. When she came in the ring I saw the trapeze set. In other words, the trapeze was pulled to one side to give room to the other actors. He put the trapeze the other way.

Q. Who did that? A. The property men.

Q. Who were the property men, do you know?

A. Yes.

Q. Who are they? What did they do?

A. He fixes all the rigging, and all of that.

Q. Speak louder.

A. He is the one who takes care of the apparatus, and all of that.

Q. Do you know who they were?

A. Yes, sir.

(Testimony of Joe America Yacopi)

Q. Who were they?

A. Somebody here in the courtroom.

Q. Someone here in the courtroom? A. Yes.

Q. Who was it? Can you point him out?

A. The man over there.

Q. Which man was it?

A. The gentleman with the glasses.

Mr. Marcus: Will you stand up, please, sir? What is his name? A. I think Franklin.

Mr. Marcus: Will you tell us your name, please? [175]

Mr. Combs: He doesn't need to give his name.

The Court: That is not proper. Is that the man you saw? A. Yes.

Q. By Mr. Marcus: What did you see him do out there?

A. He just hold the trapeze, set the trapeze.

Q. Where was it before he set it?

A. It was on the side, hanging on the side.

Q. How did it hang on the side? What kept it up?

A. There was a pulley, sort of pulley and hook in it. He pulled it to the side, to keep it out of the way.

Q. Then what happened?

A. He put it down. She came in.

Q. He put it down, and she came in?

A. Yes.

Q. Who was she? A. Miss Olvera.

Q. Did you see Mr. Pollinger in the ring too?

A. Yes.

(Testimony of Joe America Yacopi)

Q. When did he come in?

A. He came in right behind her, I remember, because he had a bathrobe.

Q. A bathrobe? A. Yes.

Q. What did she do if anything?

A. She had a small cape, and did a few dances; something like that. Then she went up. He gave the rope to her. [176] He gave the ring rope to her.

Q. Who was he? A. Mr. Pollinger.

Q. He gave her a rope? A. Yes.

Q. She went up?

A. She put her foot inside and the property man pulled up the trapeze.

Q. Then what happened?

A. She sat down on the trapeze.

Q. She did her act, did she? A. Yes.

Q. She did her performance?

A. No, she didn't went all the way through with her act.

Q. You know her act, don't you? A. Yes, sir.

Q. Have you seen it before? A. Yes.

Q. When? A. Ringling Bros. circus.

Q. For how long? A. Three years.

Q. How far through the act did she get?

A. She got up there, and when she was swinging—I don't remember how many times was swinging; the trapeze was swinging, and when she started getting up, not quite up, it [177] untangled so fast; I heard like the wire went off. I can't tell where it was, from that dis-

(Testimony of Joe America Yacopi)

tance, and she was on the ground. After, I seen the trapeze hanging on the side.

Q. Did you see anybody in the ring do anything?

A. There was the property men in there with the net, removable net, whatever they call it—removable net, a canvas net. I don't know the color, because it was dirty.

Q. When did you see these men in the ring with reference to her act? A. I beg your pardon?

Q. When did they go in the ring?

A. As soon as she started working.

Q. What did they do? A. Supposed to—

Q. Not what they were supposed to, what did you see them do? A. I saw with the net, holding.

Q. Did they stand?

A. Stand there, with the net, like that, around. It has got holes in the net, and they stick their hands in a hole, in a position to hold the net. You can't hold it straight with your feet, because in case a body fall down, it will get out of balance. Your muscles had to be relaxed from here to here.

Mr. Combs: Indicating from the waist to the middle of the thigh. [178]

A. Very tight over here. The hands should be here, and in the proper position over here.

Q. By Mr. Marcus: Was that the way they were standing? A. Yes, with the head down.

The Court: I think, Mr. Combs, that he is trying to indicate how the arms were.

Mr. Marcus: Was that the way they were standing?

(Testimony of Joe America Yacopi)

A. Yes, with the head down.

The Court: I think, Mr. Combs, that he is trying to indicate how the arms were.

Mr. Marcus: I think that is far enough, for the record.

The Court: He did it substantially as you indicated it, although, as he held his hand out, I don't believe his hands were extended quite as far as yours were extended.

Q. By Mr. Marcus: Did you see Miss Olvera when she fell down? A. Yes, sir.

Q. Did you see the net men? A. Yes, sir.

Q. Did the net move at all?

A. Not at all; positive.

Q. Where did she fall? A. On the ground.

Q. How far from the net?

A. Around two feet, or a foot and a half.

Q. About a foot and a half? [179] A. Yes.

Q. Did you see her strike anybody on the way down?

A. Yes, she must have struck somebody.

Q. Did you see it?

A. I didn't see it, because I was very careful, because I know a long time the act in the Ringling show, so I had understood.

Q. You saw the trapeze afterward, did you?

A. Yes, sir.

Q. Did you see one side lowered? A. Yes.

Q. What side was lowered?

A. The left side, which faced me.

(Testimony of Joe America Yacopi)

Q. Where were you seated?

A. Where I was seated was on the stand, because I was sitting in front of the music.

Q. Was there any music going when she fell?

A. No, not in the feature act; no music for the act, which is with everyone, a feature act never music present.

Mr. Combs: I move that that go out.

Mr. Marcus: Let it go out.

The Court: It may go out.

Q. By Mr. Marcus: Let me ask you, Mr. Yacopi. In her act, was there any music played?

A. No, sir.

Q. Can you tell us with respect to whether or not there [180] was any noise at the time she began to perform the last part of her act in the tent?

A. Not at all.

Q. Was it quiet? A. Very quiet.

Q. What did you do after she fell?

A. After she fell, naturally, I got excited, and I try to go over there, but I can't go. All the people stand up right away; everyone stand, so I say to myself—

Q. What happened to her?

A. I seen a gentleman, Mr. Pollinger, pick her up.

Q. Mr. Pollinger you saw? A. Yes.

Q. What did he do?

A. He picked her up and took her from the inside of the ring outside of the ring. Someone else helped.

Q. Did you see Miss America at any time afterward?

A. Not right away, because I tried to go down, but the ushers stopped me.

(Testimony of Joe America Yacopi)

Q. When did you see her next?

A. In the hospital.

Q. When was that?

A. A few minutes later. I took a taxi.

Q. You went to the hospital? A. Yes.

Mr. Marcus: Cross examine. [181]

Cross Examination

Q. By Mr. Combs: You were a friend of Miss Olvera at that time, were you?

A. Yes; my family too; and his friend.

Q. Also Pollinger's?

A. No, good friends; just worked together at the Ringling show.

Q. How did you happen to go over to Anthony, Kansas that particular day?

A. Why? Because I had nothing to do. I was relieved from the doctor. I was sick; my throat.

Q. Were you particularly interested in seeing Olvera's act that day? A. Yes.

Q. Did you know she was seeking an opportunity to return to the Ringling show?

Mr. Marcus: I object to that as being incompetent, irrelevant and immaterial. It is calling for his conclusion.

The Court: It appears to be. Objection sustained.

Q. By Mr. Combs: Did Miss Olvera say anything to you about her desire to return to the Ringling show from the Barnes show?

Mr. Marcus: I object to that as being hearsay.

(Testimony of Joe America Yacopi)

Mr. Combs: If she said anything to him it would be hearsay, your Honor.

Q. You say that another man other than Pollinger pulled [182] her up into the trapeze?

A. Mr. Pollinger and property man.

Q. And another man?

A. Property man; working man.

Q. Which one did the actual pulling on that occasion?

Mr. Marcus: He said both of them.

Mr. Combs: I am asking him what he is saying now.

Mr. Marcus: I object to that, counsel, as not evidence.

Mr. Combs: I am asking him the question.

The Court: Overruled.

A. The property man.

Q. By Mr. Combs: The property man?

A. Both the property man and Mr. Pollinger.

Q. They were the two who pulled her up on that occasion? A. Yes.

Q. And you saw that yourself?

A. That's right.

Q. This was a three-ring circus, was it not, at Anthony, Kansas, that Barnes was putting on?

A. I don't remember how many rings there was.

Q. You don't remember? A. No.

Q. Where did you sit?

(Testimony of Joe America Yacopi)

A. In the grandstand; I sat in the chair.

Q. Where, with relation to you, was Pat Valdo sitting?
A. He was right behind me. [183]

Q. Immediately behind you, in the next row?

A. No.

Q. How far?

A. I think it was the second or third row down; something like that. I don't quite remember.

The Court: Will you read the answer, Mr. Dewing?

(Answer read by the reporter.)

Q. By Mr. Combs: Below you, in the grandstand?

A. I don't remember about that.

Q. Did you talk to him there at all?

A. No, sir.

Q. Did he talk to you at all? A. No, sir.

Q. You did see him there, though?

A. I saw him. I went to the show and I saw him there during the show.

Q. You saw him in the grandstand? A. Yes.

Q. You don't know how many acts there were in this circus?
A. No, sir.

Q. Or how many rings? A. No.

Q. There was a big top, a big tent, was there not, in this Barnes show?

A. Like Cole Brothers; something like that. [184]

Q. Not as big as the Ringling tent? A. No.

Q. But a big tent?

A. I can't tell how big was the tent. It can't compare with the Ringling show, the tent.

(Testimony of Joe America Yacopi)

Q. How high was it? A. I don't really know.

Q. How high? A. What?

Q. The tent. A. I don't really know.

Q. How long was it? A. I don't know.

Q. How wide was it? A. I don't know.

Q. How big was the ring in which Olvera performed?

A. The ring?

Q. Yes.

A. I can't tell that exactly; smaller than the Ringling show, or the same size, maybe it was.

Q. How high was the trapeze hung off the ground?

A. Around 40 feet.

Q. Around 40 feet? A. I think 40 or 45.

Q. Was that a bar trapeze? A. No. [185]

Q. A crane bar? A. I call it a bridge.

Q. Can you identify it for the record? I think a bridge means the same as a crane bar.

A. Yes, somebody call it a bridge; and somebody call it a crane bar.

Q. Do you know whether or not there were any other acts going on in the tent at the time this act was going on? A. Yes.

Q. How many?

A. I just pay attention to only two acts; her and the two acts on the side.

Q. Those were going on when she fell?

A. No.

Q. They stopped when she fell? A. No.

(Testimony of Joe America Yacopi)

Q. What happened?

A. There no was any act while she was doing the feature act.

Q. There weren't any clowns in the runway?

A. No clowns there.

Q. No clowns there? A. No, I did not see any.

Q. This was a three-ring circus, wasn't it?

Mr. Marcus: I object to that as having been asked and answered. [186]

The Court: I think it has been. I think he said he did not know.

Q. By Mr. Combs: What were these other two acts going on? A. When?

Q. When Miss Olvera started her act.

Mr. Marcus: Mr. Combs, I think you misunderstood. He said there was only one act.

Mr. Combs: He said there was only one act going on when she fell?

Mr. Marcus: Yes.

Q. By Mr. Combs: There were two other trapeze performers during the time she started?

A. Two working together, but during the feature act they leave her alone.

The Court: Perhaps he doesn't understand it.

Mr. Marcus: At that time he did testify there was no other act on when she was performing her feature act. A. Yes.

(Testimony of Joe America Yacopi)

Q. By Mr. Combs: What do you mean by feature act?

A. He announces the number, the last number.

Q. Was it the last part of it?

A. I don't know what you call it, sir. The last number, after they finish the act, he announces the number by herself.

Q. I presume that this circus tent was similar to the circus tent of any other circus of about that size; it contained all sorts of paraphernalia, including blocks, [187] pulleys, chains, cables, canvas, and tent equipment, did it not?

Mr. Marcus: I object to that as assuming facts not in evidence, and calling for the conclusion of the witness.

The Court: It is rather compound.

A. There are about 40,000 different items in a circus tent.

The Court: That was not what the court had in mind. You started out saying it was about the same size. He said it was not the same size; that it was smaller than Ringling.

Q. By Mr. Combs: There were a large number of circus paraphernalia, such as blocks, tackle, pulleys, trapeze equipment, nets, and other circus equipment, in this tent, were there not? A. That's right.

Q. Is that right? A. That's right.

Mr. Marcus: I can't hear you.

A. He asked if there was wire, net, and so forth.

Mr. Combs: Mr. Marcus wants you to talk a little louder.

(Testimony of Joe America Yacopi)

Q. By Mr. Combs: I asked you this: What paraphernalia— A. I don't understand.

The Court: I don't think he understood the word "paraphernalia," but when you designated the items, Mr. Combs, I am sure he understood you.

Mr. Combs: I thought he did. [188]

Q. The wires— A. Props.

Q. Props, as you call them, they were there, as in other circuses, during the performance?

A. Yes.

Q. How many people were in the audience?

A. I don't remember.

Q. Several thousand, weren't there?

A. I don't know.

Q. You haven't any idea? A. No.

Q. There were more than just a few?

A. Naturally.

Q. Was the tent more or less filled with people?

A. I don't remember what the crowd was.

Q. Whether it was a thin crowd or a big crowd?

A. I don't remember.

Q. You don't know how many performers there were in the tent at the time the accident occurred, do you?

A. No.

Q. But there was a band there, wasn't there?

A. Yes.

(Testimony of Joe America Yacopi)

Q. How many pieces?

A. I don't count the pieces of the band.

The Court: You are dropping your voice.

A. I don't know how many was in the band. [189]

Q. By Mr. Combs: Have you discussed this case with Mr. and Mrs. Pollinger prior to coming into the courtroom here?

A. No, sir.

Q. You never discussed it with them at all?

A. No, sir.

Q. You never talked with them about the case at all?

A. No, sir.

Mr. Combs: That is all.

Q. By Mr. Marcus: You talked to me about it, didn't you?

A. Yes, to you, but not Miss Olvera or Mr. Pollinger; I never did.

Mr. Marcus: That is all.

I am now offering the testimony of Mr. Aristo Miguel, the Indian Chief, page 189, starting at line 11, Mr. Combs.

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

Mr. Marcus: This is the testimony of

ARISTO MIGUEL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

"Q—Chief, were you working with the show in 1937?

"A—Yes, sir.

"Q—Were you at Anthony, Kansas on the date of this accident?

"A—Yes, sir.

"Q—Where were you at the time it happened?

"A—I was in the big tent.

"Q—What kind of work were you doing? [190]

"A—Property man.

"Q—Were you in the tent at the time the fall occurred?

"A—Yes.

"Q—Did you notice her act, before that?

"A—No.

"Q—You didn't see her go up on the trapeze, did you?

"A—No.

"Q—What was it that attracted your attention to the act?

"A—I just came in and I heard a snap that brought my attention.

"Q—You heard a snap, you say?

"A—Yes.

(Deposition of Aristo Miguel)

“Q—What sort of snap was that?

“A—Just like a chain.

“Q—Do you think you would recognize that snap if you heard it again?

“A—Yes, I guess I could.

“Q—Was that a metallic snap?

“A—I don’t know.

“Q—Was that a snap of metal?

“A—Yes, something like that.

“Q—Did you hear that?

“A—Yes.

“Q—Is that what attracted you to the act?

“A—Yes. I seen that and I seen her drop. That’s all. [191] That is the last I seen.

“Q—Did you look at the—

“The Court: Is that correct? Is your answer correct?

“A—Yes.

“Q—Did you see it or hear it?

“A—I hear the snap and I seen her fall, that is, half way between the ground and the trapeze.

“Q—You saw the apparatus, however, after she fell, did you not?

“A—Yes, I just took a glance at it. That’s all.

“Q—Was it swinging when you looked at it?

“A—Yes, it was swinging.

(Deposition of Aristo Miguel)

"Q—What was the condition of the apparatus at that time?

"A—Well, it looked like to me it was swinging sideways.

"Q—Well, what was the condition of the lower bar?

"A—Well, it was kind of a little lower, yes, three or four inches.

"Q—You mean one side of the bar was three or four inches lower?

"A—Yes.

"Q—Do you remember which side that was?

"A—I couldn't say. The right side, I guess it was.

"Q—How long did that bar remain up in the air?

"A—I couldn't tell you.

"Q—Do you know when it came down? [192]

"A—No.

"Q—You don't know who ordered it down?

"A—No.

"Q—What happened after she fell?

"A—They took her out. That's all I remember.

"Q—Did you help take her out?

"A—Yes, I helped take her out.

"Q—At the time, was there a net in the ring?

"A—I don't know at that time.

"Q—You didn't see the net?

"A—No.

"Q—What did you do when she fell?

"A—I ran across on the other side, where the bandstand was, between the star backs, as they call it,—

(Deposition of Aristo Miguel)

“Q—Did she fall in the ring or outside the ring?

“A—I don’t know. I couldn’t tell you that.

“Q—Where was she when you ran around?

“A—They were bringing her out when I came there.

“Q—They were taking her out when you came?

“A—Yes.

“Q—Who was taking her out at that time?

“A—Her husband, I guess—one of them. I don’t know.

“Q—Did you hear her say anything at that time?

“A—Yes. She hollered, ‘Look at my traps. They are hooked.’ Something like that. I don’t remember. That was the time I glanced up there when she was coming down. [193]

“Q—Did you go out with her?

“A—Yes. We took her out.

“Q—Who else besides you and her husband?

“A—I don’t know. There was a few other people. I don’t know.

“Q—Were there very many people around there at that time?

“A—Yes, quite a few.

“Q—Can you estimate how many people came in the ring?

“A—In the ring?

“Q—Yes.

“A—I don’t know, in the ring.

“Q—How many people were there in the same vicinity?

“A—You mean where she took her act?

(Deposition of Aristo Miguel)

"Q—That is right.

"A—Maybe four or five or six. Something like that. Everybody was excited, so—

"Q—Was Miss America conscious all the time?

"A—It seem like to me, no.

"Q—You don't think she was?

"A—She was just saying about the hook. That's all.

"Q—I mean, she was talking, wasn't she?

"A—That's all she said, about the hook.

"Q—How long did Miss America remain outside the tent?

"A—After she come out?

"Q—Yes.

"A—Well, I guess about fifteen or ten minutes; some- [194] thing like that; fifteen or twenty minutes.

"Q—Then what happened?

"A—We put her on a stretcher and we carried her out to the automobile—

"Q—Will you talk a little louder, please?

"A—We carried her out to the automobile, and they couldn't put her in the automobile, so they called an ambulance.

"Q—She went away in the ambulance, did she?

"A—Yes.

"Q—And you remained there?

"A—I remained.

"Q—You did not go to the hospital?

"A—No.

(Deposition of Aristo Miguel)

“Cross Examination

“Q—You were a property man, is that correct?

“A—Yes, sir.

“Q—And how long had you been with the Barnes show?

“A—Since 1934.

“Q—Since 1934?

“A—Yes, sir.

“Q—On that particular day, did you engage in the activities of a property man?

“A—I don't know what you mean.

“Q—All right.

“A—Explain it to me a little more. [195]

“Q—On that particular day, did you set up props?

“A—Yes.

“Q—What did you do in that connection?

“A—Well, I am an outside prop. You see, I don't work on the inside.

“Q—You were outside, then, at the time the accident occurred?

“A—No, I had just come in.

“Q—You had just come in?

“A—To watch the show, yes.

“Q—Where were you?

“A—On No. 1 ring, I think.

“Q—At No. 1 ring?

“A—Yes, on the back side of the bandstand.

(Deposition of Aristo Miguel)

"Q—The bandstand was between you and Miss Olvera?

"A—No. The bandstand sits here, and what you call the main ring sets in the middle.

"Q—Is that No. 1 ring?

"A—I don't know if they call it No. 1 ring.

"Q—Well, you knew you were at the No. 1 ring. That was where it was?

"A—The main entrance coming in.

"Q—The main entrance coming in. The center entrance around No. 1 ring?

"A—The ring where I was standing was the main ring. There was no seats there. [196]

"Q—Were you on the main side of the ring?

"A—I was on the side where no seats were.

"Q—The main entrance?

"A—I came into the main entrance.

"Q—And you were more or less standing on the side at the time?

"A—No, I was where the star backs was.

"Q—You were not sitting down?

"A—No. There were no seats there. They didn't put them up that day, some how or other.

"Q—Then you stood where the star backs should be, at that time?

"A—Yes.

"Q—And that was within about 10 feet of the circus entrance to the tent, is that right?

"A—No, about fifteen or twenty. Pretty close to Miss Olvera's stand.

(Deposition of Aristo Miguel)

“Q—Where was Miss Olvera’s act at that time? Was it in the first ring, where you stood, or beyond that?

“A—It was in the middle ring.

“Q—It was in the middle ring?

“A—Yes.

“Q—About how far away from you where you stood at that time?

“A—Fifty feet.

“Q—From the point where you stood? [197]

“A—Yes.

“Q—And you were outside of the outer track, around which horses and parades occur in the circus inside the big top, weren’t you?

“A—In the big top, yes.

“Q—All right. The band was approximately opposite the middle ring, wasn’t it?

“A—No. Right in front of it, I guess.

“Q—Right in front of the middle ring?

“A—Yes.

“Q—So that the band was more or less between you and the middle ring, wasn’t it?

“A—No. It was at the side of me. The band was on the side of me.

“Q—On which side?

“A—On the left. I was on the right side of the band.

“Q—Was the band playing at that time?

“A—Yes, the band was playing at that time.

“Q—What were they playing, do you remember?

“A—I don’t remember, no.

(Deposition of Aristo Miguel)

"Q—They were playing all through the act, weren't they?

"A—Yes.

"Q—And yet you heard that snap? You are sure you heard that snap?

"A—I heard something snap.

"Q—You heard something snap? You couldn't say that it [198] was Miss Olvera's trapeze that snapped, could you?

"A—Well, she fell at that time, so I don't know.

"Q—Couldn't you say that you heard a snap?

"A—That is what brought my attention, yes.

"Q—About how loud was the band playing?

"A—Well, they play sometimes soft and sometimes play loud.

"Q—It was loud enough to be heard in the whole circus tent, wasn't it?

"A—I guess it was, yes.

"Q—How many people were in the band?

"A—I don't know. About eighteen or nineteen, I guess.

"Q—And they are all wind instruments, aren't they?

"A—Yes.

"Q—Trumpets?

"A—Yes, trumpets.

"Q—And other wind instruments? And there were other things going on at the same time, were there not?

"A—Yes, at the same time.

(Deposition of Aristo Miguel)

“Q—At the same time Miss Olvera did her act, there were other acts going on, weren’t there?

“A—Yes. I just came in at that time to see her fall. That’s all.

“Q—There were perhaps fifty or more people doing things; some of them with mechanical devices and some of them without mechanical devices, at that time, were there not? [199]

“A—Not fifty.

“Q—How many were there?

“A—I couldn’t recall the number, but there weren’t that many.

“Q—Well, there were twenty or thirty; around twenty or thirty?

“A—I guess something like that.

“Q—Were there any animals in the ring?

“A—Not at that time.

“Q—Not at that time. But there were other trapeze in operation, weren’t there?

“A—Yes.

“Q—You are familiar with the clap that a trapeze artist somethings gives at about the time he is going to be caught by another person, aren’t you? Have you heard that clap?

“A—No, I haven’t.

“Q—Well, you have heard that sort of a noise around a circus tent, haven’t you?

“A—I can’t get that.

(Deposition of Aristo Miguel)

“Q—Well, don’t try, then. Let’s ask another question. Have you ever heard chains and other objects or other mechanical devices rattle around a circus tent?

“A—Oh, yes.

“Q—In fact, animals shake chains and make a noise like the clash of a chain, don’t they?

“A—Yes. [200]

“Q—So that you couldn’t say that that clash of a chain, that you say you heard, emanated from Miss Olvera’s trap, could you?

“A—I just glanced up there. I couldn’t say.

“Q—Did you go right to Miss Olvera’s side when you saw her fall?

“A—No, I didn’t go right to her side after she fell, no.

“Q—When did you first go there?

“A—When they brought her outside.

“Q—When they brought her out of the tunnel? You first went to her side when they brought her out of the tunnel, is that right?

“A—When they brought her out of the ring, yes.

“Q—Well, let us go back again. You stood in the tunnel, is that right?

“A—No; not in the tunnel. Near the tunnel.

“Q—Near the tunnel. Did you run right over to Miss Olvera’s ring?

“A—No; I didn’t run over.

“Q—You remained where you were, didn’t you?

“A—I remained there a few minutes, and then went around.

(Deposition of Aristo Miguel)

“Q—What do you mean by a few minutes?

“A—Two or three seconds.

“Q—Then you went around the ring?

“A—Yes, and they brought her out.

“Q—Well, they were bringing her out when you first got [201] to her side?

“A—Yes.

“Q—How far had they brought her? Fifteen or twenty feet from the ring?

“A—They brought her from where she fell to the bandstand.

“Q—And that was about how far from the point where she fell?

“A—Well, I couldn't tell you how far that is.

“Q—Was it twenty feet or thirty or fifty feet?

“A—No; more than that.

“Q—More than fifty feet?

“A—Not more than fifty. About thirty feet.

“Q—That was the first time you heard her talk?

“A—I heard her scream when she fell, but I didn't know whether it was her or the audience.

“Q—Somebody screamed, but you don't know whether it was the audience or her?

“A—Yes.

“Q—The first time you heard her talk was when she was at the bandstand?

“A—She was hollering when I came up.

“Q—At that time she said, ‘Look at my traps!’?

“A—Yes.

(Deposition of Aristo Miguel)

“Q—What did she do? Anything else?

“A—No. She wanted somebody to look after her traps. [202]

“Q—Did you go and look after them?

“A—No.

“Q—Did you assist in carrying her out?

“A—I assisted in carrying her out, and there hung the trapeze swinging.

“Q—How far away from that trapeze that was swinging were you when you looked up at it?

“A—About thirty or forty feet, or thirty feet, or something like that.

“Q—And there it was just swinging back and forth?

“A—Yes.

“Further Cross Examination

“Q—Mr. Miguel, did you enter the big top that day from the menagerie tent or through the main entrance?

“A—The menagerie tent. I went over to get some ice cream.

“Q—I didn’t get that.

“A—I entered from the menagerie tent.

“Q—I didn’t hear that yet.

“A—I entered from the menagerie.

“Q—You are familiar with the big top, the tent they used that year, are you not, in 1937? Do you remember the size and shape of it?

“A—I don’t know the size of the tent.

(Deposition of Aristo Miguel)

“Q—Do you remember it was not round; it was oblong? It was long from one end to the other? [203]

“A—Yes.

“Q—And the two entrances were from where the bible seats were, were they not, the blue-backed seats?

“A—Yes.

“Q—The blue-backed seats are at the end, is not that correct?

“A—Yes.

“Q—So you were entering from one of the ends when you entered from the menagerie tent, is that correct?

“A—Yes; to the main big top.

“Q—And you stood there at the entrance where the bible seats or the blue-backed seats would have been if they had been up that day? Is that correct?

“A—Yes.

“Q—In other words, you were between the tent and outside of the arena track at one extreme end of the tent, is that correct?

“A—Yes; I was out of the arena track.

“Q—So that between you and the center ring was the No. 1 ring, is that correct?

“A—Well, I don't know how those rings are numbered. I always put it No. 2 as the main ring.

“Q—The end ring?

“A—Yes.

(Deposition of Aristo Miguel)

"Q—You were outside of the arena track at the end of the tent there, and the first ring in front of you was the end [204] ring, is that correct?

"A—Yes; the end ring.

"Q—Was Miss Olvera performing in that ring?

"A—No. She was in the center ring.

"Q—There was a trapeze performance going on in the end ring, is that correct?

"A—Yes.

"Q—To your right and behind the center ring as you came in there, there was a bandstand, is that correct?

"A—The bandstand in the center, yes.

"Q—Directly behind the center ring?

"A—Yes.

"Q—Do you have any idea of the distance from the seats at one end of the big top, the distance from there to the center ring?

"A—No; I don't.

"Q—You haven't any idea as to what it would be in feet?

"A—Oh, about fifteen or twenty feet, I guess.

"Q—Would you say your recollection is it was only fifteen or twenty feet?

"A—That is, from the star backs to the center ring.

"Q—It is fifteen or twenty feet from the star backs to the arena track, is it not?

"A—I couldn't tell you.

(Deposition of Aristo Miguel)

“Q—Then there is the distance across the arena track, is there not? [205]

“A—Yes.

“Q—Then there is the distance from the arena track to the end ring, is there not?

“A—Yes.

“Q—And there is the distance across the end ring, is there not?

“A—Yes.

“Q—And that end ring is at least 50 feet wide, is it not?

“A—Yes. I think about 40 or 50 feet, or something like that.

“Q—And then there is the distance from the end ring over to the center pole, is there not?

“A—Yes.

“Q—And then there is the distance from the center pole over to the center ring, is there not?

“A—Yes.

“Q—All that distance was between you and this performance in the center ring, is that correct? Did you get that question?

“A—No, I didn't get that very good.

“Q—Will you read the question, please?

“(Question reread.)

“A—Well, I was about 50 feet, I guess, from the center ring.

“Q—But you were at that time standing where the blue [206] back seats would have been at the end of the tent?

“A—Not blue seats. Star back seats; reserved seats.

(Deposition of Aristo Miguel)

"Q—They are the ones at the extreme end of the tent?

"A—Yes.

"Q—Right at the entrance from the menagerie tent?

"A—Yes.

"Q—And there was between you and the center ring the distance from the star back seats to the arena track; is that correct?

"A—About 50 feet.

"Q—To the arena track?

"A—Yes.

"Q—Oh, I see. You were about 50 feet from the arena track, is that your testimony?

"A—No; the center ring.

"Q—How far were you from the arena track?

"A—I was right close; about 10 feet or 15 feet.

"Q—Then there was the distance across the arena track, is that correct?

"A—Yes.

"Q—And the distance to the end ring; is that correct?

"A—You are talking about the end ring. I am talking about the center ring.

"Redirect Examination

"Q—You say you were approximately 50 feet from the center ring? [207]

"A—Yes.

"Q—That's all."

(After admonishing the jury the court here took a short recess.)

Mr. Marcus: Call Dr. Tasker.

DAIN L. TASKER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Marcus: Will you state your full name, please, Doctor? A. Dain L. Tasker.

Q. Doctor, are you a duly licensed and practicing physician and surgeon in this county?

A. Yes, sir.

Q. How long have you been?

A. I have practiced in this city since January, 1898.

Q. Do you have any specialty, sir?

A. I am a roentgenologist in the X-ray department, Wilshire Hospital.

Q. How long have you been such roentgenologist?

A. I have been in charge—I believe the hospital now is 20 years old, and I have been there all the time.

Q. Have you done any other roentgenologist work?

A. Yes, I have had a private practice in my office, in [208] the Auditorium Building, at the corner of Fifth and Olive.

Q. How long have you been practicing, did you say?

The Court: Since 1898.

Q. By Mr. Marcus: How many X-rays would you say you have examined, as a roentgenologist, since that time? A. Over a hundred thousand.

(Testimony of Dain L. Tasker)

Q. What is a roentgenologist, Doctor?

A. One who specializes in the use of the X-ray, either for therapy or for diagnosis.

Q. Did you take some X-rays of Miss Olvera?

A. I did.

Q. Can you pick out the ones that you took, Doctor?
I show you Exhibits 3 and 4.

A. These are not mine. These are the ones, that have my title on.

Q. Doctor, will you read these X-rays for us at this time, and if you can, illustrate to the jury while you are reading them.

A. These films are dated 5-13-38. They consist of a pair of what we call stereoroentgenograms. They give the third dimension quality in the X-ray; and these are mine. This is what is called the anterior-post direction; that is, from the front of the body to the back, in order to give the detail of the spine, bringing it as close as possible to the film.

These films show a change in density of the body of the [209] third upper lumbar vertebrae—the first, second and third, and also a moderate change in the depth of the intervertebral disks; that is, the cartilaginous cushions between them. The lateral view, made at that time, gives a more detailed delineation of the change in form of these vertebrae. The first, second and third lumbar vertebrae show an increased density of their upper portion, and a marked change in the contour, forcing them out, and compressing them from the top to the bottom, characteristic of what is known as a compression frac-

(Testimony of Dain L. Tasker)

ture; that is, a crushed fracture, from end-on force, either from above or below, and which is known by the term compressible fracture, because you can see the intervertebral discs here are changed in character in comparison with the bony ones below and above.

This increased density in this area shows that a repair reaction has occurred in there to consolidate the injured area, and that is the characteristic reaction of nature in the repair of a compression fracture. That just about covers the ground.

Q. Doctor, what is the purpose of the disk in the spinal column?

A. The disk is a shock absorber.

Q. What does it do, so far as the individual is concerned?

A. It is a portion of the supporting column, and there is a disk between each pair of vertebrae throughout the length of the column. They are in the movable portion of [210] the spinal column, and, as I said before, they are shock absorbers.

Q. When the disk has been damaged or destroyed, what effect does that have upon the movement of the spine in that particular area affected?

A. It limits the movement very materially.

Q. Do the X-rays indicate to you that the disks have been damaged to the extent that there is a limitation in the movement of the spine?

A. It definitely indicates there is damage to the disk, and whether that disk is by compression protruded forward or backward can only be told by clinical symptoms,

(Testimony of Dain L. Tasker)

not by visualization in the film, because of the cartilage it shows no greater gravity, no greater density, than the surrounding soft tissue; therefore, you do not see it in this foramen, where the nerves come out from the spinal cord; you do not see it there. In fact, the probabilities are that it has been pouted out, either dorsal or lumbar, backward or forward, or to the side. That can only be due to the effect of this injury to the nerves passing through that area.

Q. What nerves pass through the area affected?

A. In the spinal cord, just about here, at this first lumbar interspace, the large trunks go down to the lower extremities, passing out of these various openings through the lumbar region, down to what is called the equina cauda, or "horse's tail" in the sacrum. [211]

Q. That would be the bone in a human being, down in here?

A. In the sacrum, back of the pelvis.

A Juror: Your Honor, may I ask a question?

The Court: You may.

A Juror: How many vertebrae have been injured?

A. Three; the first, second and third.

Q. By Mr. Marcus: To what extent has there been any injury to the vertebrae themselves, Doctor?

A. They have a severe compression of their upper halves; you can see the lines here in each one of them, where that compression ends.

Q. What effect does that have upon the operation of the vertebrae, or the purpose for which we have vertebrae?

A. First of all, it changes the contour, produces posterior curvature, called kyphosis.

(Testimony of Dain L. Tasker)

Q. Do you mean curvature of the spine?

A. Yes.

Q. Is that so indicated by the X-ray?

A. Yes. You can see here the curve is not symmetrical. There is a quick change, beginning at the first lumbar and ending at the third. The curve is toward the back, that is, the dorsal region. Toward the front is the lumbar region.

A Juror: What direction do you get the view we have?

A. This is a lateral view. This is profile.

Q. By Mr. Marcus: What is the purpose, Doctor, of the vertebrae themselves; that is, the first, second and third [212] lumbar vertebrae.

A. They are a portion of the supporting spinal column.

Q. If they are injured, what effect does that have, first, upon one's posture?

A. It changes it, because the weight support naturally depends upon the integrity of the parts that constitute the framework.

Q. What effect does it have upon the nerves going through the vertebral column?

A. It may or may not have an effect upon the nerves

Q. If they do have that effect, Doctor, what would that effect be?

Mr. Combs: I object to that as assuming facts not in evidence; not a proper hypothetical question; and not taking into consideration all the elements involved.

(Testimony of Dain L. Tasker)

Mr. Marcus: I am going to ask him both sides, to be fair: If it did not, there would be no effect, am I correct?

Mr. Combs: Ask him in the proper manner.

Mr. Marcus: There is already a foundation laid on that by Dr. Steele Stewart's testimony. He so testified, at the time, I believe, there was a hemorrhage within the vertebral column, if I remember his testimony correctly.

The Court: I don't recall it, Mr. Marcus.

Mr. Marcus: I will pass it for the moment. I will find it in the record. [213]

Q. Doctor, are there any spurs on this X-ray?

A. No spurs other than the protruding margin where the compression took place; but there are no spurs in the sense we ordinarily see spurs in that region of the spine.

Q. You have indicated a portion of the first, second and third lumbar vertebrae, extending beyond the lower portion of each one. What does that indicate to you, Doctor?

A. The upper portion of the vertebra, this is the area of compression. It has been crushed. Naturally it has got to go somewhere when it is crushed, and it pouts out.

Q. When it is crushed, what does it do to the vertebra itself? What effect does it have upon the fibers or the cells of the vertebra?

A. The structure of the vertebral body is sponge-like in character, like a sponge compressed; and the cellular structure, in this case there was a collapse of the cellular structure in the upper portion of the vertebral body.

(Testimony of Dain L. Tasker)

The Court: Doctor, can you point to one of the vertebrae showing evidence of collapse?

A. In the first lumbar you see the profile margin comes up to about here, about half of its depth, running directly through the center. The rest of this shows a different form; its upper half is protruded forward, out of line. There has been a change in its superior upper surface. There is an increase in density, in the upper half of that vertebra, characteristic of repair; solidification of the [214] vertebra in order to maintain its functional capacity, to support weight.

Q. Is there solidification of the vertebra itself, or is it in connection with some other vertebra?

A. No, it is strictly within its own substance.

Q. Will you indicate to the jury where the spinal column is?

A. You can see a succession of vertebral bodies, which represent the spinal column.

Q. Within these vertebrae do you find the spinal cord?

A. No, the spinal cord is behind these vertebral bodies, in the spinal canal.

Q. Will you indicate to the jury if there has been any injury in the vicinity of the spinal canal?

A. The vertebral bodies, in their posterior relationship to the spinal canal, do not show any marked changes. The compression starts from the posterior superior margin, angles forward and downward.

(Testimony of Dain L. Tasker)

Q. For the benefit of those who are laymen, so far as the medical profession is concerned, when you say posterior superior you mean the backward upper part?

A. The backward upper portion, yes. The intervertebral disk here has evidently been markedly injured, because a portion of it has disappeared to a substantial depth. Where that structure has gone to, whether it has either been by straight out absorption, or it has been pouted out into the [215] posterior canal, the spinal canal, has pouted forward, nothing shows on this radiograph.

Q. It is not there?

A. It is not there. It has been injured, and I assume it went into the canal.

Q. What effect would that have upon the individual?

Mr. Combs: I object to that as assuming a fact not in evidence.

Mr. Marcus: There can be no evidence of something that is no more there.

The Court: If there is no evidence of it, what is the use of taking up the time?

Mr. Marcus: If it went into the canal, and caused some nerve change, or some anesthesia, which the other doctor testified to, I submit the evidence here would indicate and support the theory of Dr. Steele Stewart.

Mr. Combs: I object to that upon the ground that it assumes a fact not in evidence.

The Court: Overruled. You may answer. Let me make this suggestion, Mr. Marcus; using the testimony of the other doctor, if you desire, as a basis for your hypothetical question, propound to him a question indicat-

(Testimony of Dain L. Tasker)

ing, if there should appear anesthesia over a certain surface of the body, then on that basis, what might the condition be?

Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Olvera, would that [216] indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts; assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain part of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and, therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

(Testimony of Dain L. Tasker)

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied. [217]

Q. By Mr. Marcus: Doctor, will you indicate to the jury where the roots, or where the nerves emanate from the spinal canal?

A. They emanate from the spinal canal through what are called the foramina.

Q. Would you indicate from the third down to the first about what areas those nerves serve?

A. You can see these areas along like shadows. These represent large openings through which the nerves emanate from the spinal canal, and they come out to join and form large trunks or plexus, we call them, to go down and control the sensation and motion of our lower extremities.

Q. Do the nerves from the canal that you have indicated for the first, second and third lumbar vertebrae, serve the lower portion of the body?

A. Yes; the neurologist usually traces out the areas of pain and hypersensitivity, or anesthesia, by methods of touching a member, and from that he finds the site of the pain, and comes back to the areas by which these areas are supplied by nerve fibers.

Q. Is there any repair that can be made to the spinal canal itself if it has been injured?

A. Nature always makes the repair of injured structures. Therefore, there are no two cases alike; there cannot be, because forces impinging upon the structures

(Testimony of Dain L. Tasker)

injure them, and therefore compression influences pouting of the intervertebral [218] disks, and in many of these fractures that are present they have no neurological symptoms with them.

Q. Is there any known repair outside of nature itself to the spinal column?

A. If we have a compression injury, followed by involvement of the nerve fibers, producing pain and anesthesia, the surgeon frequently steps in and does an operation, fixing the joints to take pressure off the area. That is a frequent orthopedic operation on the nerve involved.

Q. If the pressure is taken off, what effect does that have upon the vertebra itself, Doctor?

Mr. Combs: I presume you mean in this particular case?

Mr. Marcus: Certainly.

A. It stabilizes the individual, and gives him a firm foundation, instead of insecurity.

Q. Can you give us the details of that operation?

A. I am not an orthopedic surgeon.

Q. Does an involvement such as you have indicated here, of these three vertebrae and the nerve fibers, produce pain?

Mr. Combs: I object to that as calling for the conclusion of the witness, and not within this expert's professional knowledge.

The Court: Overruled. You may answer.

A. That is a problem in the individual cases, as I have just testified. Some of these compression fractures

(Testimony of Dain L. Tasker)

have no symptoms whatever other than the one. During the period [219] of repair, when they are weak and hurt, their stability is not good, but they make an excellent repair, and there are no after effects.

Q. You mean by surgical repair?

A. No, by nature's repair.

The Court: Do you limit your question as to pain?

Mr. Marcus: Yes.

The Court: After the repair, or at any time?

Q. I should say first before the repair, Doctor, before the repair has taken place.

A. There is always pain previous to the repair, because you have inflammatory swelling and pressure, and gradually, as the repair is accomplished, the swelling, and so forth, which constitutes a scaffolding around the repair area, is taken down by nature, and we no longer have the pressure influence. But if the injury has gone to the extent of pushing the bone or cartilage, and so forth, into the spinal aperture, then the pressure will be constant, and remain until the surgeon gives him support.

Q. That, under the circumstances you have indicated, will have to be limited to surgery?

A. That will have to be done surgically.

Q. That cannot be done by nature's repair?

A. No, it could not be.

Q. Do you have any other X-rays of your own, Doctor, which would be of assistance in explaining this matter? [220]

A. No, I haven't. There are two sets here.

(Testimony of Dain L. Tasker)

Q. Doctor, I think your tab goes on this.

A. That's right. The other ones I have. These films were made 7-27-38 and consist of stereograms in the antepost direction with respect to her pelvis, and a lateral exposure with respect to her lumbar vertebra.

Q. Doctor, will you look at the pelvis X-ray? Will you please read that X-ray?

A. This radiograph shows a density in the area just above the hip joint, and that may or may not have pathological significance. That is, it might be something that is pathologically a natural development in this individual. It is not necessarily diseased. Over on the opposite side is what is called the iliac fossa of the ileum, which is the wing bone of the pelvis. There is a density lying in here. The significance of that I do not know, because I haven't the history that goes with it. Otherwise, the pelvis looks intact, in good condition, and there is nothing characteristic of anomalous development, injury, or pathology, other than the one I have mentioned.

Q. Doctor, assume that Miss America Olvera on September 12, 1937, fell from a trapeze, approximately 22 to 23 feet in the air, to the ground on her back, the lower portion of her back, would this X-ray indicate anything to you?

Mr. Combs: That is objected to upon the ground that no proper foundation has been laid; assuming facts not in [221] evidence, and a thoroughly improper hypothetical question. He states an isolated group of facts, not taking all of the facts involved in the situation, and

(Testimony of Dain L. Tasker)

most of them do not include symptom facts of any kind or nature whatsoever. All of those are omitted from the so-called hypothetical question that he asks regarding the picture.

Mr. Marcus: I submit, your Honor, that the doctor said he had no history. With that in mind, I framed the question which would give him the history of this fall.

Mr. Combs: The question does not give the history, your Honor.

The Court: What would you add to it, Mr. Combs?

Mr. Combs: I would add all of the symptoms; all of the historical facts and the data. Of course, I don't purport to be able to draw his hypothetical question for him. I do know sometimes these questions take many pages of carefully drafted paper. Certainly in this case there is more involved than the mere sentence which he has given.

The Court: Hypothetical questions may be short as well as long. Some are very long; some short. Here he is assuming only that the person whose photograph was there X-rayed has fallen 22 feet, and has fractured—

Mr. Combs: —on her back. That's all the facts he has given. I respectfully submit that is very inadequate.

The Court: I think there should be an assumption as to whether or not there was any previous condition. [222]

Q. By Mr. Marcus: And that there was no previous indication of any injury that she had suffered to her back or pelvis prior to that date.

(Testimony of Dain L. Tasker)

Mr. Combs: I object to that upon the grounds heretofore stated, as well as it is assuming facts not in evidence.

The Court: I think the objection is good.

Mr. Marcus: You may answer.

Mr. Combs: Did you sustain the objection?

The Court: I intended to sustain it.

Mr. Marcus: Pardon me.

The Court: Proceed.

Mr. Marcus: I will reframe the question.

Q. Doctor, assuming that the individual represented by this X-ray was a trapeze performer, on or about September 11, 1937, while performing as a trapeze artist in the air on a bar approximately 22 feet from the ground, while lifting herself on the bar on one leg, and swinging back and forth on the trapeze, at the same time fell from the trapeze, and in falling grabbed both of her legs at the knees, and landed on the ground on her back, and that the person so falling had not at any previous time suffered any injury to her back or pelvis, under those circumstances, Doctor, would the densities in these X-rays indicate anything to you?

Mr. Combs: I object to that as assuming facts not in evidence.

The Court: Is there any evidence, Mr. Marcus, that Miss [223] Olvera had never been injured at all in her back or pelvis?

Mr. Marcus: Yes, your Honor, she so testified on cross examination. One accident was when she fell in

(Testimony of Dain L. Tasker)

New York on her face, she said that she had injured her wrist.

Mr. Combs: There is not any evidence to the effect that she had not ever before suffered any injury to her back or pelvis. That is not the only objectionable feature to that question. It is unintelligible.

The Court: I think the objection should be sustained.

Mr. Marcus: Mr. Combs, these are your X-rays. Will you stipulate that we may introduce these at this time?

Mr. Combs: So stipulated.

The Clerk: Do you want them marked as one exhibit?

The Court: Let them be marked as Plaintiff's Exhibit 5.

Q. By Mr. Marcus: Doctor, will you read that X-ray?

A. This appears to be a lateral exposed radiogram of the plaintiff's lumbar region, visualizing the changed structure in the first, second and third vertebrae, just repeated with respect to the films which I made. There is nothing additional here with respect to the changes in form or any characteristics indicating anything of a nature different than that to which I have already testified regarding the previous films.

Q. The same condition is indicated to you, Doctor?

A. The same.

(Testimony of Dain L. Tasker)

Q. We have another pelvis here, Doctor. Will you look [224] at it?

A. This presents the same shadows as those in the ones that I made; that is, a density on the right, and another over on the left. I don't know the significance of them. I merely know that they are there.

Q. Is that density that you see in the X-rays, and which you have pointed out, a normal condition?

A. We don't usually see anything of that kind, no.

Q. Will you examine this one, Doctor?

A. This is similar to the one I just examined.

Q. Do you find that same density in the pelvis?

A. Yes, the same. These are merely taken at slightly different angles. The tube has been shifted a little; therefore, it shows enough change to indicate to me that the films are probably stereoscopic films for the third dimension.

The Court: Doctor, does the examination of these pelvis X-rays indicate anything pathological?

A. Not of any active character, no, sir.

Mr. Marcus: You may cross examine.

Cross Examination

Q. By Mr. Combs: You would say, Doctor, would you not, that these pelvic densities, if they were fractures, are completely healed?

A. Yes; and there would be evidence of places in the ileum where they came from. There is no evidence any place [225] in the bony structure of the pelvis where these fragments came from.

(Testimony of Dain L. Tasker)

Q. What fragments are you talking about?

A. A shadow; densities.

Q. These were fragments?

A. I don't know what they are. They are foreign shadows in there. The history would be the only way to get at that.

Q. You are not able to state that they are fractures?

A. No, I am not.

Q. Or that the pelvis had been fractured?

A. There is no evidence of any fracture to that pelvis.

Q. And it indicates that the pelvis is normal?

A. That pelvis shows no evidence of having been fractured.

Q. Would you say it never has been fractured?

A. I would say, so far as I can interpret it, I don't think it has ever been fractured.

Q. Is there any improvement indicated in the latter group of X-rays as against the former group?

A. The condition is essentially the same in both cases. I think they have reached a static condition; reached the end of the repair reaction.

Q. That repair action is nature's course of repairing a damaged member of the body, is that right?

A. Yes. [226]

Q. Frequently, in the case of human beings who are injured, that process sets in and makes a complete repair, does it not?

A. Yes. By a complete repair, that does not mean that it is in the condition it was before the injury.

(Testimony of Dain L. Tasker)

Q. That's right, but frequently bones that have been broken are stronger after repair than before?

A. They might be, where a big amount of callus is thrown out.

Q. There is no evidence, and from your examination you are not able to make any statement, of any bone or matter of any kind or nature that has passed into the spinal column, are you? A. No.

Q. From these X-rays, and from your examination, you would state then there is no such condition, is that right?

Mr. Marcus: I object to that as assuming facts not in evidence. This man is a roentgenologist, and called for that purpose.

Q. By Mr. Combs: I will qualify the question. There is no condition of that nature displayed by your examination, or the X-rays involved?

Mr. Marcus: I object to that. No proper foundation has been laid. He never testified that he examined Miss Olvera.

The Court: He is referring, the court believes, to the examination made of the X-rays. Is that correct? [227]

Mr. Combs: That's right.

Mr. Marcus: If it is limited to that, there is no objection. I understood him to say that he examined Miss Olvera.

The Court: You may answer.

A. I made no physical examination of Miss Olvera. All I know is what I see in the films. My testimony is strictly upon the shadows in the films.

(Testimony of Dain L. Tasker)

Q. By Mr. Combs: That would require you to state that these films do not show any foreign matter of any kind or nature in the spinal cavity, is that right?

A. Spinal canal?

Q. Spinal canal.

A. No, I couldn't certify that there was anything in there at all.

Q. And your X-rays do not disclose anything in there?

A. No, they do not disclose anything.

Q. That is likewise true of your examination in relation to the so-called pouting out of these disks that rest between the various vertebrae, is it not?

A. I did not catch the first of your question.

Q. Your answer respecting the examination of these X-rays would be in relation to the so-called pouting out of the disks between the vertebrae—there is no evidence in the X-rays of such condition?

A. The only evidence is in the rise and depth of the [228] disk area. The disks have to go somewhere when they are compressed. That is, they go outside, backward, forward, or some place, or will undergo a gradual absorption as a result of the injury.

Q. So you would have to speculate on that phase?

A. That is a problem, in the examination.

Q. The X-rays do not disclose the condition of those disks?

A. No. The only way we could do that would be by injecting idiol, that is, iodized oil, into the disk, and watch it while studying under a fluoroscope.

(Testimony of Dain L. Tasker)

Q. The compression of several vertebrae, as indicated by these X-rays, could occur from a fall in which the individual falling either struck upon her head or shoulder, or other extremities, is that right?

A. It would have to be a vertical force.

Q. More or less vertical?

A. It would have to be sufficiently vertical to produce the flexation of the body, to get the force toward the front.

Q. You came to that conclusion, I presume, because of the fact that the outside portion of the spine—I guess you call it anterior, or do you call that posterior, that is the back?

A. That would be posterior.

Q. The posterior part of the spinal canal in this case is not compressed, is that right? [229]

A. Yes, she has what we call a dorsal curve; that is, a posterior curve.

Q. It is the anterior portion of these three vertebrae alone that is compressed?

A. So far as we can see in the film.

Q. I take it that is what guides you to the conclusion that the fall involved was one which involved the doubling of the body more or less forward?

A. It has to do that, in order to compress these bodies in the way they are exhibited in the film.

Q. Have you any way of determining within a period say of six months, the length of time in which a fracture to the back occurs, similar to that?

A. No.

(Testimony of Dain L. Tasker)

Q. Can you tell us where in the X-ray, the first examination, the first group of X-rays, the spinal canal itself ends?

A. I can tell you approximately where it ends, yes. You understand, there is not anything shown in the film where it ends. This is of my own knowledge of anatomy. It ends probably just about in this space, where this disk is thinnest, in the first lumbar interspace.

Q. The first lumbar is immediately below that point, is that right?

A. The first lumbar is immediately above.

Q. The first lumbar is immediately above that point? [230]

A. Yes.

Q. I take it that the compression indicated in this picture includes that particular vertebra?

A. Yes, the first, second and third are included.

Mr. Combs: That is all.

Mr. Marcus: Counsel and I have stipulated that Exhibit No. 1 may be introduced in evidence.

Mr. Combs: Yes, that is agreeable, without the requirement of a foundation.

The Court: These may be received and marked as Plaintiff's Exhibit No. 6.

Mr. Marcus: May this be handed to the jury at this time, your Honor?

The Court: If you desire.

(Whereupon an adjournment was taken until Thursday, January 6, 1944, at 10:00 o'clock a. m.) [231]

Los Angeles, California, Thursday, January 6, 1944;
10 A. M.

The Court: The members of the jury are all present.
So stipulated?

Mr. Marcus: So stipulated.

Mr. Combs: So stipulated, your Honor.

Mr. Marcus: This morning our testimony is going to
be that of the prop boy, page 627 of the transcript.

CHARLES JOHNSON,

called as a witness on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

"Q—Mr. Johnson, what was your business or occupation during the year 1937?

"A—I was a property man.

"Q—With whom?

"A—Al G. Barnes Circus.

"Q—And what were your duties in connection with such employment?

"A—My duties were to take props into the ring and help set up the various minor acts, such as tables, like Mr. Pollinger's act, and things like that.

"Q—Are you acquainted with Miss America's rigging?

"A—Not very much.

"Q—Did you ever see it before?

"A—Certainly. I carried it in every day.

"Q—Are you acquainted with this trapeze? [232]

"A—Yes, sir.

(Deposition of Charles Johnson)

“Q—Is this the trapeze you carried in?

“A—That is the box and trapeze.

“Q—Referring to Plaintiff’s Exhibit 4.”

Mr. Combs: I suppose that is another exhibit now?

The Clerk: That is No. 1 in this case.

Mr. Marcus: We will call it 1 in the question.

The Court: That is satisfactory to the court if it is to you, Mr. Marcus.

Mr. Marcus: Yes.

“Q—Referring to Plaintiff’s Exhibit 1. Where was this apparatus kept?

“A—It was kept out in the back yard.

“Q—Was it kept with any other apparatus there?

“A—Yes, quite a lot of other apparatus next to that.

“Q—Was that kept with any other apparatus used in the snow?

“A—Yes, it was.

“Q—when was this rigging and apparatus set up?

“A—It was set up as soon as the top went up and the poles went up. The first things the riggers would do, they would set the rigging.”

The Court: Mr. Combs, I believe the apparatus was marked 1.

Mr. Marcus: Let us amend the question retroactive as to 2. [233]

The Court: No. 1 is the trapeze apparatus.

(Deposition of Charles Johnson)

“Q—On the 12th of September, 1937, do you know who set up this rigging?

“A—One of the riggers I know was a man called Whitey, who had been given charge of the rigging—that particular rigging.

“Q—Did you see him erect this rigging?

“A—No, I did not.

“Q—Did you see him erect it on September 12, 1937?

“A—Yes, sir, I seen him erect it several times.

“Q—On September 12, 1937, the date of this accident?

“A—Yes, sir.

“Q—You observed him put this up?

“A—I did.

“Q—How long had he been with the show?

“A—I should imagine shortly—five weeks, four or five week; I am not sure.

“Q—Do you know of your own knowledge whether he had had any other previous experience prior to the erection of Miss America’s rigging?

“A—I do not.

“Q—Did he continue the season with the show?

“A—He did not.”

Mr. Marcus: I withdraw the objection.

“Q—Are you acquainted with Philip La Bay?

“A—No. [234]

“Q—Are you acquainted with Blackie Williams?

“A—Blackie Wallace?

“Q—Blackie Wallace. I think that is his show name.

“A—Blackie Wallace, I think he was a rigger.

(Deposition of Charles Johnson)

"Q—On the date of this accident did Blackie Wallace do anything in connection with Miss America's rigging?

"A—I don't know.

"Q—You don't know whether he did or not?

"A—No.

"Q—Are you acquainted with Karl Pollinger?

"A—Yes, sir.

"Q—How long have you known him?

"A—For the entire season of 1937.

"Q—On the date of the accident can you tell us what time Mr. and Mrs. Pollinger came out into the tent?

"A—They came in the tent a few minutes before the act went on.

"Q—Had there been any previous acts prior to the time their performance came on?

"A—Yes, sir.

"Q—And before they came on can you tell us whether or not there was anything done with their apparatus?

"A—I do not know.

"Q—Or with her apparatus?

"A—I can't.

"Q—Do you know when it was that her apparatus was [235] put in place?

"A—In the morning it was put in place.

"Q—Do you know when it was lined up or trued up?

"A—I don't know, because I worked in another ring. I didn't watch it.

(Deposition of Charles Johnson)

“Q—You didn’t watch it and you don’t know what happened. Did you see them come out that afternoon for the performance, September 12, 1937?

“A—Yes, sir. I was standing there where they always come out.

“Q—In the erection of Miss America’s rigging, did you see Howard Mentz there?

“A—Howard wasn’t on the lot.”

Mr. Combs: The answer was stricken. We ask that the answer referred to, which counsel has just read, be stricken. That was stricken the last time.

The Court: If the record so shows—

Mr. Marcus: That may go out.

The Court: Let us one talk at a time. If the record so shows it may go out. Are you both agreed that the record does so show?

Mr. Combs: Yes.

Mr. Marcus: That is correct.

The Court: The jurors are instructed to disregard it.

“Q—Will you answer the question, please?

“A—I did not observe him. [236]

“Q—Do you know what his condition was at that time?

“A—Yes, sir. He had a broken leg and had his foot in a cast.

“Q—Do you know who was supervising the erection of the rigging on that day?

“A—Mr. Ringling, or rather Miller is his name.

(Deposition of Charles Johnson)

"Q—Chandler Miller?

"A—Chandler 'Ringling' Miller.

"Q—Will you please tell what you observed about Mr. and Mrs. Pollinger at the time they came out to perform and at the time Miss America performed her act?

"A—Well, I noticed the time Mr. Pollinger went over to hold the web for Mrs. Pollinger. I saw her go up.

"Q—You mean the web? Does that mean a rope?

"A—Yes; we call it a web in the circus—up to perform her act. Of course, when she went up there was a trapeze act in each one of the other rings, and these two acts terminated before she started hers. When she started her act, you see, the property men just stood in our rings. If we wish we can go to the side and watch the act. However, I stayed in my ring and watched the act, from there. I always watched the acts. She went up in the trapeze and Mr. Pollinger swung her with the web. After she was swinging fairly good she slowed down a little and started to get up, and the first thing I knew she was down.

"Q—As she stood up to take a bow? [237]

"A—She doesn't take a bow; she swings and then she goes into her act.

"Q—You mean she was standing up?

"A—She was standing up, and when she stood up she fell out.

"Q—She wasn't on her knees, was she, when she fell?

"A—No, she wasn't on her knees when she fell, because she was swinging on the trapeze.

(Deposition of Charles Johnson)

“Q—Did you see the men in the ring with the net?

“A—Yes, sir; eight property men holding the net.

“Q—Do you remember their names?

“A—One was Tony; I don’t know his last name. Another boy that held the net was Puddy; another boy by the name of Joe; and four or five others. There were eight holding the net.

“Q—How large was this net?

“A—About 8 by 8, I should imagine.

“Q—And how large was the ring?

“A—The ring would be about 30 feet in diameter; something like that.

“Q—When she fell did the net move at all?

“A—The net did not move; no.

“Q—How far from the net did she fall?

“A—Well, as far as I remember, one of the boys claimed that she hit him when she fell.

Well, I would say she fell about one foot from the net. [238]

“Q—Did you see her after she fell?

“A—Yes, sir, I saw her.

“Q—Was she unconscious at any time after she fell?

“A—She wasn’t unconscious. She was screaming and it seemed to me like she said, ‘The trap threw me. The trap threw me.’

“Q—At any time that you observed her after she fell and before she was taken out of the tent was she unconscious?

(Deposition of Charles Johnson)

"A—I saw her when they carried her out and she was screaming. I saw her outside a few minutes afterwards, and she had a doctor with her, setting her arm.

"Q—Was she unconscious?

"A—She wasn't. She was talking to me.

"Mr. Marcus: You may cross examine.

"Cross Examination

"Q—By Mr. Combs: When were you first employed by the Barnes Circus?

"A—I joined the Barnes Circus here in Los Angeles early in 1937.

"Q—Early in 1937?

"A—Yes, sir.

"Q—In Los Angeles?

"A—In Los Angeles.

"Q—You did not join it, then, the first of the season?

"A—I did not.

"Q—What were your duties as a rigger? [239]

"A—I wasn't a rigger; I was a property man.

"Q—You were a property man?

"A—Yes.

"Q—What did you do in that connection?

"A—I helped set up the tents. I helped carry in such things as her trapeze and other acts and helped with the cage and different acts.

"Q—You were a friend of Karl Pollinger's, were you?

"A—I wasn't a friend. I never knew anyone—

(Deposition of Charles Johnson)

“Q—Did you meet him first, I mean, while you were on the show?

“A—I never knew any show people until 1937. I had never been with a circus in my life.

“Q—But you became acquainted with Karl Pollinger on the show and you became friendly with him at that time, didn’t you?

“A—I became to know him very well, yes, sir.

“Q—And became an intimate friend of his?

“A—No, sir. I worked with the circus.

“Q—But you were an intimate friend of Karl Pollinger, weren’t you?

“A—My boss, Mr. Williamson, told me to help him with his act.

“Q—No. Were you an intimate friend of Karl Pollinger?

“A—I wouldn’t say an intimate friend.

“Q—Well, you helped Karl Pollinger with his act, [240] didn’t you?

“A—Yes, sir.

“Q—You helped him with his act?

“A—I helped him with his act.

“Q—Putting up the Eiffel Tower and the airplane motors and screws and those things?

“A—Yes.

“Q—You devoted most of your time to that act, didn’t you?

“A—No; about an hour or so to set it up.

(Deposition of Charles Johnson)

"Q—It only took an hour or so to set it up?

"A—Yes, sir.

"Q—It didn't take three or four hours to set it up?

"A—No, sir.

"Q—Just a little over an hour?

"A—A little over an hour.

"Q—And you assisted every day in the erection of that piece of apparatus?

"A—Yes, sir.

"Q—And that was one of your regular duties with the show?

"A—That was one of my duties, and my boss told me to do it.

"Q—Who was your boss?

"A—Blackie Williamson.

"Q—Blackie Williamson? [241]

"A—Correct.

"Q—What was the occasion for you going out and seeing Mrs. Pollinger in the tent, after the accident?

"A—Well, quite a few of us men went out there. Our act was over at that particular moment. I went out in the back yard. She was out in the back yard, and the back yard was full of people.

"Q—How many, other than yourself, went out there at that time?

"A—Blackie Williamson was out there. Quite a few prop hands. Quite a few performers.

(Deposition of Charles Johnson)

“Q—Was there any duty you had to perform, after Miss Olvera’s act that day, in the big top?

“A—Certainly, when the next act was on; but they had no next act after that. That made it vacant in the center ring after that.

“Q—Normally what did you do after Miss Olvera finished her act?

“A—We had no act in our ring. I went out and took a smoke.

“Q—You went out and took a smoke?

“A—Yes.

“Q—So that was the occasion for your being able to go out and see her, outside the tent?

“A—Yes, sir.

“Q—Can you tell me whether or not the band was playing [242] when the trapeze act was going on?

“A—Let’s see. No, sir, I don’t think the band was playing.

“Q—You don’t think the band was playing. Could you tell me how many people there were in the band?

“A—There is about fifteen or eighteen people, I imagine.

“Q—Fifteen or eighteen people. Can you tell me what entrance Miss Olvera made? What entrance did she come in?

“A—The center entrance.

“Q—Right adjoining the bandstand?

“A—Yes, sir, right in front of the center ring.

(Deposition of Charles Johnson)

"Q—Explain just exactly where you were standing when the accident occurred.

"A—At the center pole, close to the center pole in the No. 1 ring.

"Q—How many feet from Miss Olvera's trapeze?

"A—About fifty feet, I should imagine.

"Q—About fifty feet. You are sure the band wasn't playing at that time?

"A—I says I wasn't sure.

"Q—you are not sure. The band might have been playing, is that it?

"A—Well, I can't say for sure.

"Q—Well, it might have or might not have?

"A—It generally plays on the entrance. I don't know [243] whether it stopped or not.

"Q—The net that you saw on that day was the same net as always was used in Miss Olvera's act, wasn't it?

"A—Yes, sir.

"Cross Examination

"Q—Mr. Johnson, what were you doing in the No. 1 ring?

"A—I was a property man in the ring, sir.

"Q—What were your duties there?

"A—My duties were to help different acts, help guy out ropes; to help riggers guy out traps and different acts; such things as that.

(Deposition of Charles Johnson)

"Q—Did you have anything to do with the act that was going on there while America Olvera was performing in the center ring?

"A—No, sir. It was a trapeze act—

"Q—That was a trapeze act?

"A—Yes, sir. The rigging was a one-man job.

"Q—And all you did was to carry in things and put them on the ground, is that right?

"A—That is right.

"Q—When did that act in the No. 1 ring start, that was on when America Olvera's act started in the center ring?

"A—Pardon me?

"Q—Was there an act on in the No. 1 ring while America Olvera's act was on in the center ring?

"A—The act was on when America Olvera starting into [244] the ring.

"Q—A single trapeze act?

"A—Yes, sir. Then when she does her trapeze acts in the No. 1, the act in the No. 3 ring terminates. In other words, she had a feature attraction there.

"Q—You say that terminated before she stood up on her trapeze?

"A—No, not until she got up.

"Q—What did she do when she got up?

"A—She started to stand up and the next thing I knew she was down. She fell."

Mr. Marcus: We will now read the testimony of Jack Lysaught, beginning on page 617 of the transcript of the former trial.

JACK LYSAUGHT,

called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Marcus.)

"Q—Jack, where do you live?

"A—At the present time?

"Q—Yes.

"A—1201 South Main.

"Q—How old are you?

"A—21.

"Q—Were you employed in the Barnes show? [245]

"A—Yes, sir.

"Q—When?

"A—1938—1937 and 1938.

"Q—Is that the time Miss America was with the show?

"A—Yes, sir.

"Q—How old were you at that time? About 19?

"A—Yes, sir.

"Q—And what kind of work were you doing with the show?

"A—I was a rigger.

"Q—Had you had any previous experience as a rigger before you entered the show?

"A—Not as a rigger. I had worked as a prop man on different shows.

"Q—But as a rigger, I mean.

"A—No.

(Deposition of Jack Lysaught)

"Q—Did you do any work on her rigging?

"A—No, sir. All I did was drop the rigging.

"Q—At the end of the performance?

"A—Yes, sir.

"Q—Do you know who actually put up her rigging on the 12th day of September, 1937?

"A—Mr. LaBay and a fellow we called Whitey. I don't know his name.

"Q—And when was this rigging erected?

"A—During the course of setting the show up. That was before the arena went up; before the show was ready to [246] start, or anything."

Mr. Combs: I think we skip over to 619, line 5?

Mr. Marcus: That's right.

"Q—Who was actually working there on the rigging on September 12, 1937?

"A—On Miss America's rigging, you mean?

"Q—Yes.

"A—Blackie Wallace, that is, putting the rigging up. I can't say he guyed the rigging up.

"Q—Blackie Wallace? Is that Philip LaBay?

"A—Philip LaBay, yes.

"Q—And a fellow by the name of Whitey?

"A—Yes, sir.

"Q—Anyone else working on her rigging?

"A—No, sir.

"Q—Did you observe them put up her rigging?

"A—Yes, sir.

(Deposition of Jack Lysaught)

"Q—When was that done?

"A—That was in the morning, right after we got in town. The top was up, we had the flying acts up and then her rigging came next.

"Q—Do you know Howard Mentz?

"A—Yes, I do.

"Q—Was he working on the rigging that day?

"A—No, sir.

"Q—Did he have anything to do, so far as you saw on [247] that day, in connection with the erection of this rigging?

"A—No, not of that rigging.

"Q—Do you know whether he was there at any time during the erection of that rigging?

"A—He did not supervise it, no, not that day.

"Q—Did you have a conversation with Howard Mentz that day?

"A—Coming back from the cookhouse after the show was over, yes.

"Q—Was that prior to the evening show?

"A—Yes, sir.

"Q—And was that subsequent to the afternoon show?

"A—Yes, sir.

"Q—Was anyone else present there?

"A—No, sir, there wasn't.

"Q—What was Mr. Mantz' condition at that time; physical condition?

"A—He had a sore foot; a broken foot. I think he had one crutch; I am not sure.

(Deposition of Jack Lysaught)

“Q—You had a conversation with Howard Mentz, you say?

“A—Yes, sir.”

Mr. Combs: We skip clear down to—

Mr. Marcus: Page 622, line 3.

“Q—Did you see Howard Mantz in Hollywood in 1938?”

Mr. Marcus: Skip down to line 26.

“A—Yes, sir, I did. [248]

“Q—Did you have a conversation with him at that time?

“A—Not pertaining to the accident, no, sir. We was working together at the time—

“Q—Did you observe the accident in question?

“A—Yes, sir, I did.

“Q—Where were you standing at the time?

“A—No. 2 center pole.

“Q—Did you see Miss America and her husband come out?

“A—No, sir, I never.

“Q—When did you first observe them?

“A—I first observed her when she was on her rigging.

“Q—And did she perform an act at that time?

“A—Yes, sir, she did.

“Q—Did you see her fall?

“A—Yes, sir, I did.

“Q—Will you relate whether or not there was a net underneath the rigging?

“A—Yes, sir, there was a net.

(Deposition of Jack Lysaught)

"Q—How large was that net?

"A—About 8 by 8 square.

"Q—Do you remember who was holding the net?

"A—No, sir, I don't. There were eight prop hands.

"Q—They were prop hands?

"A—Yes, sir.

"Q—Do you know whether or not Philip LaBay was holding the net? [249]

"A—He wasn't.

"Q—He wasn't?

"A—No, sir.

"Q—Did you observe where these net men were holding the net?

"A—Under the rigging.

"Q—And do you know whether or not at the time she fell that they moved the net at all?

"A—No, sir, they never moved it.

"Q—Did they move it?

"A—No, sir.

"Q—Did you observe the entire act?

"A—No, sir, I never.

"Q—Did you observe the moment that she fell?

"A—Yes, sir.

"Q—Did you observe the apparatus afterwards?

"A—No, sir, I never.

"Q—Do you know where she fell with reference to the net?

"A—Ahead of the net; in front of the net.

(Deposition of Jack Lysaught)

“Q—How far from the front of the net?

“A—I would say a foot or two.

“Q—And at that time do you know whether or not the net was moved at all?

“A—It wasn’t moved; no, sir.

“Q—Did you see her after she fell?

“A—No, sir, I never. [250]

“Q—Did you hear her say anything after she fell?

“A—No, sir; she was screaming. That’s all I know.

“Q—You heard her screaming?

“A—Yes, sir.

“Q—Was Miss America unconscious at that time?

“A—No, sir.

“Q—Was she unconscious at any time after she fell?

“A—They carried her out. I don’t know whether she got unconscious after she left the tent or not.

“Q—Did you see her husband there?

“A—Yes, sir.

“Q—Do you know who picked her up?

“A—No, sir. The men were all crowding around her, and I had to drop the rigging right away. I seen I couldn’t be of any assistance, so I didn’t go over.

“Q—You say they dropped the rigging immediately?

“The Court: He said, ‘I had to drop the rigging.’ That is what you said?

“A—Yes, sir.

(Deposition of Jack Lysaught)

"Q—By Mr. Marcus: You say you dropped the rigging immediately?

"A—Yes, I dropped one side of it and the other man dropped the other side.

"Q—Did you see who directed you to drop the rigging?

"A—No, sir. We did it that way at the end of every show. [251]

"Q—Did you hear any whistle?

"A—No, sir, I never did.

"Q—Did you observe her condition after they took her out?

"A—No, sir, I never. She was screaming.

"Q—Did you hear her say anything as they took her out?

"A—No, sir, I never."

Mr. Marcus: The plaintiff rests at this time, your Honor.

The Court: The jury will be excused. They will retire to the jury room. Bear in mind the admonitions of the court heretofore given you, and return when called by the bailiff.

Mr. Combs: At this time, if your Honor please, the defendants in this action desire to make a motion for a non-suit on the following grounds, and for the following reasons:

That the contract sued upon in this case is a contract made under the laws of the State of Florida, and contains a clause releasing the defendants, or the contract-

ing parties, from any and all liability for damages which have occurred, or might occur, to any participant under the contract. That there has been in this case no negligence whatsoever, and no gross negligence either—neither negligence nor gross negligence, proved, by either of the defendants in this action.

And this motion, your Honor, is made jointly and [252] severally for the defendants.

The Court: Mr. Combs, pardon me for interrupting you. I believe now the matter should be considered only on the basis of gross negligence in view of the pleadings. There may be some part of this motion to amend that has not been determined. I think that should be done first before you proceed with your motion.

Mr. Combs: Yes. At this time I make a motion for leave to file an amendment to the answers of both defendants, of which I am impelled by the amendment by interlineation of the amended complaint at the outset of this trial. I have submitted to the court that amendment to the answer, which sets up the statute of limitations. I argue to the court that the amendment allowed changes the entire cause of action and sets up a new cause of action, to-wit, gross negligence, which is long since barred by the statute of limitations.

Mr. Marcus: In connection with counsel's request for permission to set up the purported defense of the statute of limitations, I respectfully suggest to the court that that permission to file the amended answer be denied and stricken for this reason: That it is adjudicated law of the State of California that such defense is without merit, for this reason: There is no change in the theory of plaintiff's complaint. The only thing, that is required,

is for us to show a greater degree of care required of the [253] defendants. In other words, there is no change in the theory of the action; only the degree of proof. I believe that is important, not only with respect to gross negligence, but our Supreme Court has gone so far as to state—

The Court: Wait a minute. We will take plenty of time; if you desire to consult with the gentleman sitting there it is entirely satisfactory to the court, but I think you should give attention to this matter. Do you wish to take time?

Mr. Combs: No.

The Court: I don't know who the gentleman is.

Mr. Combs: Robert E. Corkery, an attorney admitted to practice in this court.

The Court: Do you desire to have him associated with you as counsel in the case?

Mr. Combs: Yes, I do.

The Court: The court grants the motion. I did not know who Mr. Corkery was, or his association in the matter. I thought it was important that attention be given to Mr. Marcus' argument.

Mr. Combs: Yes. Thank you.

Mr. Marcus: The plaintiff filed an amendment to their complaint, which was based on negligence, and alleged wilful misconduct, which is a considerably greater degree of care required of the defendants, and a considerably greater degree of negligence that must be shown by the [254] plaintiff than for gross negligence. The defense, likewise, was interposed at that time, that the action was barred by reason of the statute of limitations of this State. In passing upon that our Circuit Court

determined that there was no change in the policy of the action. That there was only a greater degree of proof required, and dismissed that defense as without merit.

This is not a change in the theory of the action whatsoever. It is simply a greater degree of proof, and I don't even believe, your Honor, under the new federal court rules, that it is even necessary to allege gross negligence, if from the pleadings it may be determined what the nature of the action is or the demand sued upon; that that is sufficient under our new rules. It is only the degree of proof, and that is for the court to determine. The Appellate Court determined in this instance that it was necessary, not to allege—nor do I believe there is any such statement in the opinion, that it was only necessary for us to prove, and that the court was required, under the terms of this contract, to give an instruction on gross negligence.

The Court: You are taking up time unnecessarily as to what you believe it is not necessary for you to do, because you have asked the court to permit you to amend, and you have amended. I think there is one phase of your motion to amend which has not been ruled upon, that is under advisement, [255] and that should be determined now. The court asked you if you desired to amend; you stated that you did; then you indicated why you believed the amendment should be made by interlineation. You realize it was presented to you, and you immediately acted upon the question of the court. Later you said there were some other parts that should be amended by interlineation. I think one of those has not yet been determined. Do you recall which one of those it was?

Mr. Marcus: Yes, your Honor.

The Clerk: Two.

The Court: Mr. Clifton say that there are two places.

Mr. Marcus: Paragraph 7, your Honor, line 26. If I am not mistaken with respect to the court's ruling, the court did order the amendment with respect to line 26. Then I suggested to your Honor, in view of the allegation of negligence and carelessness, in line 28, that it might be advisable to insert the word "gross" before the words "negligence and carelessness."

The Court: Was there any other place?

Mr. Marcus: Then there was a place in paragraph IX, line 4, which reads now as follows: "That as a direct and proximate result of the negligence and carelessness." I suggest to your Honor that it should be amended to read "That as a direct and proximate result of the gross negligence and carelessness." [256]

The Court: Your motion to amend in the respects to which you have referred, is granted. Now, the question is whether or not there should be an amendment to the answer. Mr. Combs, there was no defense of the statute raised in your original answer?

Mr. Combs: That is correct.

The Court: While I can agree with Mr. Marcus that, as the court views the law, there is no change in the cause of action, notwithstanding that the court is going to permit the amendment proposed to be filed. It is quite possible that Mr. Marcus' view and the court's view may be in error. I hardly think it can so be here under the California law, but I think Mr. Combs should have the right to file the amendment, and it is so ordered. Now, Mr. Combs, you may proceed.

Mr. Combs: I will not repeat the portion of my motion already made. I would assume that is agreeable to the court, although it was apparently premature.

The Court: It is unnecessary to do it.

Mr. Combs: Upon the grounds further, that the injuries suffered by the plaintiff in this matter were the result, if they were the result of the negligence of anybody, of the contributory negligence of herself.

On the further grounds that the injuries involved in this matter were the result of an unavoidable accident.

On the further ground that the injuries suffered, and the [257] accident referred to in this matter, were the result of the negligence, if there was any negligence, of the plaintiff's own employees.

On the further ground that the injuries in this accident were the result of a course of action adopted by the plaintiff with full knowledge of the nature and character of her acts and her work, and that she assumed the risk and the hazards of her employment. First, she assumed the risks and hazards of her employment as a trapeze artist in general; second, if there were any additional risks occurring as a result of the operation and management of her equipment by the Barnes Circus, that she assumed the risks and hazards of that additional situation, whatever they may have been.

Upon the further ground that the amended complaint, the amendment thereto allowed at this trial, did not state facts sufficient to sustain a claim against these defendants.

Upon the further ground that the evidence adduced by the plaintiff shows affirmatively that her own negligence, and that of her servants and her husband, contributed proximately to cause the accident sued on herein.

Upon the further ground that the terms of the contract of the parties hereto place upon plaintiff the duty of maintaining the apparatus under the clause reading:

"The artist shall furnish and maintain in first class condition at his expense all paraphernalia and equipment. The artist constructs and presents his acts with personnel [258] of troupe under his exclusive control and supervision in all particulars. The artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for the same."

Upon the further ground that in attempting to avoid the effect of the clause just referred to, and the contract of the parties, she is attempting to vary the terms of that contract, or escape from the obligations imposed by it by her own oral testimony.

May I summarize, your Honor, in addition, and by way of argument in support of the points I have just made, that the course of conduct of the plaintiff, and the course of conduct of the defendants in the maintenance and erection and so forth, of the various apparatus used in this matter, were certainly performed in conformity with ordinary skill and diligence, and the evidence so shows; and there can be no gross negligence involved in the conduct of the defendants in relation to that by virtue of the uncontradicted and conclusive evidence.

That places an unfair burden upon the defendants and calls them to account for something extraordinarily remarkable and out of the realm of normal conduct. That relates not only to the claimed defect or situation regard-

ing the trapeze itself, but as well to the question of the net. [259]

I respectfully call the court's attention, in that regard, to the rules of physics involved in that situation.

I believe that adequately covers my motion. I had one other point in mind, but it must have slipped me. I have certainly covered all the grounds, as I view it, for a motion for a non-suit, and on those grounds, your Honor, we respectfully submit we are entitled to a non-suit in this case.

Mr. Marcus: The matters that counsel has advanced for the motion at this time, for dismissal, are properly matters of defense. If they are raised, as counsel has raised them, at the close of the plaintiff's case, it is, in effect, requesting the court to state that there is no evidence of gross negligence at this stage of the proceedings. Therefore, plaintiff has not established a *prima facie* case.

Furthermore, counsel has suggested to your Honor, in his motion for a dismissal, that it was an unavoidable accident; and furthermore, that if there were negligence, that it was plaintiff's own employees that caused such accident, and therefore, she is bound by their own acts. I will pass that with just one word of comment, your Honor, because there is absolutely no evidence in this record at this time that the persons whom plaintiff claims—or the persons who are shown by the evidence to have erected the rigging, and without contradiction at all in the record—were plaintiff's employees. [260]

Counsel has also suggested, your Honor, that Miss Olvera assumed the risks of her employment and if she was injured by reason of such risks that she cannot

recover. That is not the law as set down by the appellate court in this case. Such an instruction was requested at the close of plaintiff's case on the last occasion, and the court at that time stated the instruction was properly refused.

"Olvera might recover though she knew the danger and peril of the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries."

So far as the record is concerned, it has not been shown that the trapeze was not erected properly; that it came down, and that the net was not operated in the manner that it should have been. Upon that evidence, the opinion states as follows:

"There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing and 'maintaining' parts of its 'equipment' and 'apparatus,' namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in failing [261] to hold it under her, causing the injuries and the damages to her for which the jury gave its verdict.

"Were these all of the contract provisions involved, the judgment would have to be sustained." [262]

On a motion for dismissal, it is my opinion of the law, your Honor, that there must be an entire lack of evidence at all in the record to support plaintiff's position

that there was gross negligence. We already have the law of the case. The law has been enunciated that there was either gross or ordinary negligence. The evidence is the same; counsel has not pointed out or suggested to your Honor any difference in the evidence today than it was at the previous trial. In other words, I may suggest to your Honor that there was one additional witness called, and we believe the evidence today is much stronger than it was at the last trial.

I do not believe that I will take any more of the court's time. I feel that there is no merit in the suggestion at this time that there is no evidence in the record upon which the jury can reasonably infer that there was gross negligence.

Mr. Combs: In response to counsel's argument, I first want to state that, as I view and summarize the evidence, there are vast differences on the weaker side so far as the plaintiff is concerned. In the evidence in this re-trial the particular details of those differences is such that I am not going to attempt to summarize it at this time. Suffice it to say that in my judgment as a lawyer there is not one single thing which appears in the record from which it might be inferred that the defendants ever had [263] any reason to suspect any such thing as the plaintiff claims to have occurred, unless it be through her own misfortune, by virtue of an unavoidable accident, or her own negligence, by virtue of the nature of her contract, or by virtue of her own connection with her act.

That is likewise conclusively true with the operation of the net itself, and I sincerely believe that it would be an impossibility for eight men, moving in unison, in less

than a second and a half from the time the body starts to fall, to dash over and catch the falling body in the net. I do not believe it is worthy of consideration, and certainly it is not worthy of consideration in relation to gross negligence. Even if eight men could have moved in unison to catch the body in the net from the time it commenced falling, they might have differed in judgment as to whether or not she was going to fall outside or not, if she was so close from the edge of the net of not over a foot.

So I can't agree that there is any gross negligence involved in that kind of a situation. As a matter of fact, the appellate court decision is very weak on that subject in so far as it supports the question of any negligence in the former record. I have been very careful during the trial to bring out points to obviate the expression of Justices Denman and Healy, who said not that there was evidence of negligence or gross negligence, but there was evidence from which it might be inferred; a very weak [264] expression to be indulged in by an appellate court. Justice Mathews stated:

"There was no evidence warranting a finding that the injuries sustained by appellee Overa were proximately caused by the negligence—gross or ordinary—of appellants or either of them. Appellants' motion for a directed verdict should have been granted."

Counsel, in reading that instruction which we submitted regarding the subject of the excuse from liability on the grounds of contractual assumption of risk in this case did not complete the expression of the court. The court proceeds to inform us, I regret to say, that our instruction was faulty, and that is why they sustained

your Honor's ruling refusing to give that particular instruction, stating the respects in which it was faulty. That was part of our instruction No. 14.—“The instruction was properly refused.”

This is the one relating to the contract:

“In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work [265] in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.”

That instruction was properly refused because we omitted “Olvera might recover though she knew the danger and peril of the work she was engaged in, and chose to accept them, unless the danger and peril were the proximate cause of her injuries. The requested instruction is fatally defective because not containing some such words after the words ‘she cannot recover’ as ‘if her injuries were caused by such danger and peril.’ ”

In that same instruction which we are submitting at this time to the court we are following the advice of the

appellate court. I am frank to admit that neither Mr. Murphine nor I saw the matter as the appellate court saw it. They certainly have the last say, and we gladly accept their conclusion as to what should have been the form of the instruction. So that I argue that Miss Olvera's assumption of risk, whether it flowed from a contractual obligation in itself, or from her knowledge and experience, in the assumption of that kind of business or occupation, is an element which should entitle us to relief from any possibility of liability in this case, in the very opinion of the judges who heard the matter in the appellate court.

In conclusion I will state that I am not going to [266] summarize the evidence. The court knows it as well as I do. I will say, if in Judge Mathews' opinion there was no evidence or either gross or ordinary negligence, on the first trial, that opinion would certainly stand for the present situation, and I am confident that Judges Denman and Healy would have come to the conclusion, in the present retrial, that there was no evidence from which it could be inferred that gross negligence could have been committed by the defendants.

The Court: That is based on your reading of the appellate court decision?

Mr. Combs: Yes, based on the appellate court decision, and on the transcript, both, and on hearing the evidence in this case.

The Court: Motion denied.
(Short recess.) [267]

P. W. SEALS,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: Doctor Seals, you are a physician and surgeon, licensed to practice in the State of California? A. I am.

Q. What are your qualifications for such?

A. I graduated from U. S. C., medical, in 1920. I have been practicing steady ever since.

Q. You have been connected with the State Compensation Insurance Fund for a period of time?

A. I was medical director two years for them.

Q. What has been the nature and general character of your practice?

A. It has been largely industrial; that is, treating accidents occurring in industry.

Q. Have you had any experience with bone injuries, muscle and tissue injuries?

A. Practically all of those are of that type of injury, yes.

Q. I presume during that period of time you have treated a large number of cases? A. I have.

Q. Can you give us some idea, just roughly?

A. I would say on an average there are from three to [268] five new cases every day, and in 23 years that would be quite a number of cases.

Q. Have you examined America Olvera, the plaintiff in this case? A. I have.

Q. On more than one occasion? A. Yes.

(Testimony of P. W. Seals)

Q. How frequently?

A. October 11, 1938, and then on January 18, 1940.

Q. Did you, on October 11, 1938, in connection with the examination, see certain X-rays, and examine certain X-rays? A. I did.

Q. I hand you Plaintiff's Exhibit 3 in this matter, which was Plaintiff's Exhibit 5 in the other matter, which consists of three X-ray films purporting to have been taken in May, 1938, and I will ask you to examine those films and tell the jury whether they are the films you examined in connection with your examination of the plaintiff in 1938?

A. They appear to be, yes.

Q. What part of her body do these films show?

A. They show the back, taken for the vertebrae.

Q. Would that be the lower dorsal and lumbar vertebrae? A. Yes.

Q. Will you explain to the jury what those three films show?

A. This film shows a compression fracture of the [269] vertebrae of the twelfth dorsal, the first lumbar, and also the second lumbar.

The Court: Mr. Clifton, which exhibit is that?

The Clerk: This is part of Plaintiff's Exhibit 3.

The Court: Proceed.

Q. By Mr. Combs: Is there any displacement of the fragments indicated there? A. No.

Q. Is there any disruption of the structure of the vertebra itself?

A. Except as the compression shows in the body of the vertebra.

(Testimony of P. W. Seals)

Q. Only that? A. Yes.

Q. Did you have, on the occasion of your examination of America Olvera in October, 1938, an opportunity to take any X-rays of your own?

A. Yes, I did.

Q. We have them here. Are you able to state which of those are yours?

A. They should have my name on them. These are the ones.

Q. That would be former exhibit Defendants' A; presently Plaintiff's 5. Can you state what observations you can make with respect to the showing produced by those pictures?

A. They show the same condition, except the bones show more evidence of healing. The lines of the fracture are not [270] as prominent.

Q. Do the positions of the vertebrae as shown in this picture show any deviation from the normal position and curve of the spine? A. No.

Q. Do they appear to be practically the normal curve of the spine?

A. Practically the normal curve, with a very slight exception right at the region of the fracture.

Q. What would be the designation of the vertebrae?

A. 3. This one very slightly.

Q. Name it.

A. The twelfth dorsal: the first lumbar and the second lumbar.

Mr. Marcus: If I am not mistaken, I believe the doctor stated two before.

(Testimony of P. W. Seals)

Mr. Combs: No, he stated three.

Mr. Marcus: On his direct testimony.

Mr. Combs: That's right.

The Court: You are referring to what?

Mr. Marcus: On his direct testimony at this time, when he was first called, I believe the doctor stated two vertebrae.

Q. By Mr. Combs: You were mistaken.

The Court: He may correct it.

A. After seeing the picture more carefully I observe [271] there is a slight fracture; there is another slight fracture.

Q. By Mr. Combs: You did state there were two?

A. I stated there were two, but I corrected it. The third one is the same condition regarding the vertebrae indicated in the other X-ray examinations taken at the same time as this one.

Q. What do you call that, a shadowgraph?

A. A stereoptic view, taken from the front to the back. I can't see any evidence of any injury to the vertebrae in that view of the picture.

Q. There isn't any evidence in that picture, is there, of any bone fragment in the spinal cavity? A. No.

The Court: Mr. Combs, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions.

Q. By Mr. Combs: Is there any evidence—

The Court: It has been answered. You don't need to go over it.

No. 10877

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RING-LING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POL-LINGER,

Appellee.

VOLUME II.

(Pages 385 to 756, inclusive.)

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 7 - 1944

PAUL P. O'BRIEN,
CLERK

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(Testimony of P. W. Seals)

Q. Is there any evidence of any bone fragments in the spinal cavity in any of these X-rays you have just examined? A. No.

Q. Is there any discernible evidence of any displacement of the spine in any of these X-rays? A. No.

Q. When you examined the plaintiff in October, 1938, [272] Doctor, what evidence of injury did she show?

A. She showed symptoms of having had injury to the vertebrae of the back, of the lumbar and lower dorsal region of the back, which evidence was proven by the X-ray which I took and examined.

Q. Indicating the condition respecting the vertebrae which you have heretofore stated, is that right?

A. Yes.

Q. Was there any evidence of injury of the spinal area involved apparent to the eye or touch at that time?

A. No.

Q. Was she receiving any treatment at that time, Doctor? A. Yes.

Q. What was it, if you know?

A. She was wearing a rather clumsy sort of a brace, consisting of small iron bars up and down part of the spine, with straps around the body, in an attempt to support the spine.

Q. What was the proper treatment indicated for her condition at that time?

A. I thought she ought to have a stronger brace, more rigid than the support she was wearing at that time.

(Testimony of P. W. Seals)

Q. What was the condition of her leg at that time?

A. There was nothing I found wrong with the leg at that time; she was complaining of some pain in the right hip joint region. [273]

Q. Did you make any examination for numbness or anesthesia?

A. Yes, and there was none found at that time.

Q. Did you make any examination for atrophy of the muscles? A. Yes.

Q. What did you find in that regard?

A. There was none.

Q. She stated to you the type of accident she had had, did she? A. Yes.

Q. In your opinion could the injury that she received have had any effect upon her, in the leg, or either of her legs?

Mr. Marcus: I object to that upon the ground that no proper foundation has been laid. Counsel has not elicited from this witness, your Honor, what was told to him by the patient.

Q. By Mr. Combs: I will ask that. Will you relate, if you are able to do so, from either your memory or your records, what she told you generally was the nature of her accident?

A. She stated she had fallen a distance of 25 or 30 feet, and landed on her back. The injury was to her back largely. There was no evidence of fracture or injury to the leg apparent at the time of my examination. [274]

Q. In your opinion, could the injury she received in such fall have any effect upon her right leg, that is, the injury as she described it to you? A. No.

(Testimony of P. W. Seals)

Q. You examined the plaintiff again during the week of the former trial, to-wit, during the week of January 16, 1940, did you not? A. Yes.

Q. And you heard the testimony in this case of her medical expert, did you not, I believe that is Dr. Tasker—
Mr. Marcus: Dr. Steele Stewart.

Q. By Mr. Combs: Dr. Steele Stewart.

A. I am not positive about that. I heard the testimony of some other witness; I have forgotten who it was.

Q. Did you examine her with particular reference to the disability in her right leg, during the time of the 1940 trial? A. Yes.

Q. What, in your opinion, was her condition at that time?

A. At that time she had developed what she called numbness or anesthesia in different parts of the leg, which did not fit into the picture of any nerve or grouping of nerves. I mean we have a certain pattern in the body, certain nerve supplies, if you are going to have anesthesia. [275]

Q. Will you have anesthesia of the whole area, and not a part of the area?

A. The picture she made at that time could not fit into any picture.

Q. You made an examination of the areas of which she complained of anesthesia, and you state that that picture in the portion in which she complained of anesthesia did not fit into any pattern of nerve disorder?

A. That's right.

(Testimony of P. W. Seals)

Q. There isn't any question that she has had an injury to the vertebrae of the spine, is that right?

A. No.

Q. What symptoms in that spine injury, at the time of your examination in 1940, Doctor, caused her to have pain in the back?

A. Muscular spasm of the back muscle, and the pain was aggravated by motion and use of the back.

Q. Aside from this, did you determine any other symptoms or conditions in this portion? A. No.

Q. Concerning the injuries which she has, in your opinion what are her prospects for recovery from them, and to what extent will she recover?

The Court: Are you speaking of the present time?

Mr. Combs: I will withdraw that.

Q. As of the date of your examination in 1940, Doctor, [276] what was your opinion then as to the possibilities of her recovery from the injuries you saw indicated there?

A. I felt, with proper treatment, she would be able to perform some remunerative occupation, but not that of a trapeze performer.

Q. She would not be able to perform on a trapeze?

A. No, but she would be able to do any remunerative light occupation, many of which are available at the present time.

Mr. Combs: That is all.

(Testimony of P. W. Seals)

Cross Examination

Q. By Mr. Marcus: Dr. Seals, what kind of work are you doing now?

A. Largely industrial.

Q. Are you doing orthopedic work?

A. I am doing orthopedic work, if it is overlapping the industrial.

Q. Then you are doing some orthopedic work?

A. Yes.

Q. By whom are you employed at the present time?

A. Myself.

Q. Who do you do work for?

A. I do work for several of the industrial plants.

Q. You stated that in 1938 you were employed by the State Compensation Insurance Fund?

A. Not at that time. My employment with them was in [277] 1920 to 1922.

Q. At the time of your examination had you been employed by the State Compensation Insurance Fund, or by any insurance company?

A. Except the cases they referred to me. I was not under any contract or salary with any of them, but they referred me to numerous cases to treat.

Q. What has been your experience in reading X-rays, Doctor?

A. I have had my own X-ray machine since 1923, and my own X-ray technician. During that time I have read several thousand X-rays, not only my own, but what I have seen in the various hospitals.

Q. You have read several thousand?

A. Yes.

(Testimony of P. W. Seals)

Q. Now, Doctor, point out to the jury the three vertebrae that have been injured.

A. That is the twelfth dorsal, which shows a very slight compression in the front part of the body of the vertebra.

Q. How far down does that compression come?

A. About one-sixth of the thickness of the vertebra.

Q. That indicates a very slight injury, one-sixth of the vertebra compressed?

A. Very slight, so far as permanent disability. It would give considerable pain. [278]

Q. Look at No. 1.

A. It is the first lumbar vertebra, which shows a slight fracture line extending through the anterior part of it.

Q. That extends approximately halfway down, doesn't it?

A. The fracture line does, but not the compression. The fracture line extends from here to down about the middle of the vertebra, but that is not compressed that much.

Q. No. 1?

A. No. 1 is just slightly compressed, about the same amount as the twelfth dorsal. That is the second lumbar.

Q. Is there anything else unusual about this X-ray, Doctor?

A. Not that I have been able to observe. I examined that very carefully once before.

Q. Look at it carefully, Doctor, and tell me whether or not there is any part of the spine or vertebrae missing?

A. I don't see any.

(Testimony of P. W. Seals)

Q. Look for the disks, Doctor.

A. There is space between all the vertebrae.

Q. Are the disks misplaced, Doctor?

A. I don't see any disks in the X-ray.

Q. You can't? A. No.

Q. Is that part of the vertebrae? A. No, that is a padding in between the vertebrae. [279]

Q. That is a padding in between the vertebrae?

A. Yes.

Q. That isn't part of the vertebrae? A. No.

Q. It is part of the spine?

A. Part of the spine.

Q. Show it to me then.

A. Any of these spaces; as you come down, the space between the vertebrae varies a great deal. The angle at which X-rays are taken will show the space between the vertebrae a great deal differently. You have got what we call a pin point or special view and in order to determine how much space there is between the vertebrae.

Q. Did you take any X-rays to determine whether or not there were any disks missing? A. No.

Q. You did not? A. No.

Q. But you can determine it from an X-ray, though, can you not, Doctor?

A. Sometimes you can.

Q. You said, Doctor, that her complaints about anesthesia did not fit any patterns that would indicate there was a nerve injury, is that correct?

A. That's right.

(Testimony of P. W. Seals)

Q. Doctor, where do the nerves from the spine emanate [280] that go to the leg?

A. They emanate in the lower part of the spine.

Q. Show us on the X-ray.

A. It emanates in here.

Q. The entire lower limbs?

A. They begin about here, to about here.

Q. That would involve the same vertebra that is injured, would it not?

A. It would involve the same area, yes, but—

Q. That's right.

The Court: Let him finish the answer.

A. But the injury to the vertebrae themselves has nothing to do with the nerves, unless it causes compression or some damage to the nerves.

Q. By Mr. Marcus: Didn't you state that these were compression fractures? A. Yes.

Q. Would it be possible, Doctor, that the compression would involve the spinal cord?

A. The nerves in the spinal cord.

Q. Can you answer yes or no? Then give your explanation.

A. No; the explanation is this: The nerves of the spinal column come out toward the back, not toward the front. This space you see is the spinal column. The nerves come out through the back, and as shown by other X-rays there is no [281] damage to that part of the vertebrae. If you will permit me to put that up there, I can explain it.

(Testimony of P. W. Seals)

Q. Surely, Doctor. Does a true amnesia, Doctor, indicate to you that there has been an involvement of the nerve? A. A true amnesia?

The Court: You mean, anesthesia?

A. If you have anesthesia, yes. May I finish the explanation?

The Court: Certainly.

A. You can see the back part of your vertebrae is not disturbed at all.

The Court: Is that the posterior view?

A. The anterior-posterior view, yes. If you took this view only it would not show that there had been any injury to the vertebrae at all.

Q. By Mr. Marcus: A compression fracture of the spinal column could affect the spinal column too, could it not?

A. It probably would, but not a compression fracture of the body alone.

The Court: You say "body"; do you mean the body of the vertebrae?

A. Yes, the body of the vertebrae alone.

The Court: Not the body of the patient?

A. No.

Q. By Mr. Marcus: Doctor, how can you tell whether there [282] has been an injury to the spinal column?

A. You can tell by symptoms. These develop immediately; not several months later. This is the only view that will show that. The other view will not show; this view will not show the compression fracture of the body of the vertebrae.

(Testimony of P. W. Seals)

Q. The back part of the spine is one straight bone, is it not? A. No.

Q. Or one bone, I should say?

A. No, each vertebrae has its own set of transverse process and spinous process. In each vertebra you have this transverse process there. The spine itself is what you feel in back. That sticks out behind.

Q. They all join each other, do they not?

A. Yes.

Q. In back? A. Yes.

Q. But in front of the spinal column, we will call it, these are separate, and are called vertebrae, are they not?

A. The whole structure is called a vertebra.

Q. I am talking about the front part.

A. The front part is called the body of the vertebra, separated by these disks.

Q. If there is compression of the front of the vertebra, as indicated in these pictures, then you have a destruction or compression of the vertebrae and disks between them, do [283] you not?

A. You may or may not have.

Q. You can see the disks in the X-rays, as you have testified?

A. No, I see the space the disks occupy.

Q. Look at this X-ray, and tell me whether or not these dense areas above the injured portion of the spine do not indicate to you the disks?

A. They indicate where the disks are.

(Testimony of P. W. Seals)

Q. Look at the bottom part, and tell me whether or not that same condition exists with reference to the injured portion of all the vertebrae?

A. Yes, it indicates the same thing.

Q. When you say the disks, is that this space you can see up here?

A. Yes.

Q. You can see it down here?

A. Surely, you can. The dark space in between the vertebrae, the dark line between the vertebrae, and all these vertebrae is the disk.

Q. In other words, you say this density up here, which you state is the disk, is the same as the density between the injured vertebrae?

A. Yes.

Mr. Marcus: I will let the jury look at it, if the court please. [284]

A. May I give a further explanation. The disk in the lumbar area is thicker and wider than in the upper or dorsal area. This space between the vertebrae here is larger.

Q. The disks would be larger?

A. They should be.

Q. This is one density, is it?

A. Yes; that is due, in that picture, to the overlapping of the bottom. As you go down to the upper part, it angles in this way; it goes straight up as you go down to the lumbar area.

Q. What happens when the disk is destroyed, Doctor?

A. There might not anything happen.

Q. Is it possible, when a disk has been compressed, that it can go into the spinal canal?

A. Yes, it goes into the spinal canal, and presses on the spinal cord.

Q. It presses on the spinal canal?

(Testimony of P. W. Seals)

The Court: You are misquoting the Doctor. He said it goes into the spinal canal, and presses on the spinal cord. Is that what you said? A. Yes.

Q. By Mr. Marcus: What happens when it presses on the spinal cord?

A. It produces an anesthesia.

Q. If it involves the area indicated by the injury, what part of her body would it affect? [285]

A. Her lower extremities.

Q. Did she tell you at the time, Doctor, that she suffered a fracture of her arm?

A. In this accident?

Q. Yes.

A. No, she told me she suffered a fracture of both arms in a previous accident.

Mr. Marcus: That is all.

Redirect Examination

Q. By Mr. Combs: There is no evidence in this examination you made of any of the disks, any portion of the disks, or any bone structure, having been forced into the spinal cavity, is that right? A. That's right.

Mr. Combs: That is all.

Q. By Mr. Marcus: Doctor, if it was forced into the spinal cavity, would you be able to tell from the X-ray? A. No.

Q. How do you tell us now it was not forced into the spinal cavity?

Mr. Combs: That is assuming something not in evidence. My question was there is no evidence.

Q. By Mr. Marcus: Can you definitely tell us now that it did not penetrate the spinal cavity? A. No.

Mr. Marcus: That is all. [286]

Mr. Combs: At this time, if your Honor please, I would like to read from the transcript of the former trial, and have Mr. Corkery read the answers, if that is all right.

The Court: That is satisfactory.

Mr. Combs: That will be page 339, counsel, the witness Pat Valdo. Testimony of

PAT VALDO,

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

"Q—Is that your true name, Pat Valdo?

"A—Yes, sir.

"Q—By Mr. Combs: Where do you reside, Mr. Valdo?

"A—Sarasota, Florida.

"Q—What is your occupation?

"A—I am talent scout for the Ringling Bros. Circus.

"Q—Are you employed by them at the present time?

"A—Yes, sir.

"Q—How long have you been employed in that capacity by them?

"A—About twelve years.

"Q—When did you first meet America Olvera?

"A—In the fall of 1933.

"Q—Where?

"A—In Jacksonville, Florida.

(Deposition of Pat Valdo)

"Q—Under what circumstances? [287]

"A—She came into the show about a week before we closed that season. She came on with her brother.

"Q—That was about what time of the year, did you say?

"A—That would be in the fall; in October, I believe.

"Q—About October of that year. Did you employ her or engage her as an act for the Ringling Bros. Circus at that time?

"A—No, sir.

"Q—Do you know who did?

"A—Mr. Gumpertz engaged her, her first engagement.

"Q—In the fall of 1936 did you have any conversation with Miss Olvera respecting her employment by Ringling Bros. for the production of her act?

"A—Yes, sir.

"Q—When did that conversation take place?

"A—Well, I don't recall. Her contract is dated the 24th, I believe, of September.

"Q—Of September, 1936, is that it?

"A—Yes.

"Q—Do you recall the time of the signing of that contract?

"A—I don't recall exactly. I wired the other day to find out what city we were in. We were in Wichita Falls, Texas.

"Q—Wichita Falls, Texas?

"A—Whether the contract was signed there or not I [288] couldn't say.

(Deposition of Pat Valdo)

“Q—Do you know of your own knowledge whether or not Ringling Bros. ever paid America Olvera her salary during the year 1937?

“A—No, sir.

“Q—That is, do you know whether or not they paid it or do you know that they did not pay it?

“A—They did not pay it.

“Q—You know that they did not pay it?

“A—That is, the season of 1937.

“Q—That is for the season of 1937?

“A—Yes, sir.

“Q—At that time was she performing with the Ringling Circus?

“A—No, sir.

“Q—Do you know what circus she was performing with?

“A—Al G. Barnes.

“Q—On the day of September 12, 1937, where were you?

“A—I went to Anthony, Kansas to see the Al G. Barnes Circus.

“Q—And did you observe or did you see America Olvera Pollinger on that day?

“A—Yes, sir.

“Q—Where did you see her?

“A—I saw her in the main tent before the performance for a minute. Just said hello to her. I didn't see her [289] again until after her accident.

(Deposition of Pat Valdo)

"Q—Then what did you do after you had spoken to her there in the main tent?

"A—Well, I talked with a great many of the artists and Mr. Cronin.

"Q—I mean, when was the next time you saw America Olvera Pollinger that day?

"A—To speak to?

"Q—No, at all?

"A—I saw her do her act.

"Q—Where were you when you saw her do her act?

"A—Sitting directly in front of her.

"Q—Whereabouts, in the grandstand?

"A—In the grandstand.

"Q—Was anyone with you?

"A—Mr. Cronin was there. Mrs. Bradner from the Ringling Bros. and Mr. Gray from the Ringling Bros. Circus.

"Q—You were all seated together in the stand?

"A—Yes, sir—excuse me one minute.

"Q—Yes.

"A—Mr. Cronin had gone out after the show started, and then came back in during Miss Olvera's act.

"Q—So that he was there, sitting with you, at the time of Miss Olvera's act, is that correct?

"A—Yes, sir.

"Q—Did you observe anything extraordinary take place [290] on that day; anything out of the usual?

"A—In what respect?

"Q—Well, did you observe an accident that day?

"A—Yes, sir.

(Deposition of Pat Valdo)

“Q—Will you relate to the jury exactly what you saw and what you did insofar as that accident is concerned?

“A—Well, Miss America came in, was pulled to her trapeze as usual, went through her act as usual until the time came for her to do her kneeling trick on her knees. She got on her knees; she was swung by her husband possibly three or four times, and at the extreme front of the swing she fell from the trapeze and missed the net, falling over the net, in front of the net.

“Q—Did you observe the net on that day just prior to her commencing her act, underneath her trapeze?

“A—You mean before the boys had picked it up?

“Q—I will withdraw the question. When did you first observe the net on that day?

“A—Well, I observed it for the reason that the Ringling show did not use a net of that type. This was not a net.

“Q—Will you describe that net to the jury as best you can?

“A—The net was made out of canvas with rope hand-holds set on the side so the boys could hold it. It was similar to the net used by the Wallingers in the Ringling show, [291] used not to catch a performer that would fall, but to add to the effect of the trick.

“Q—Can you describe the approximate dimensions of that net?

“A—I would say it was 8 or 10 feet square.

“Q—And by how many men was it held, approximately?

“A—That I don't recall approximately. Possibly eight or ten.

(Deposition of Pat Valdo)

"Q—Now, at the time Miss Olvera commenced her act, and during the performance of the act, will you relate where with relation to her trapeze this net was?

"A—Directly under it, so far as I recollect.

"Q—Directly under it so far as you could observe?

"A—Yes.

"Q—Did you observe America Olvera Pollinger performing with the Ringling Bros. show in the first part of 1937?

"A—Yes.

"Q—Did she use a net when performing for the Ringling show?

"A—The first season she didn't use a net. The second season, she had a fall in Madison Square Gardens, and after she recovered and rejoined the show, she used a net for one trick.

"Q—Which part of the act?

"A—I don't recall. It was not the finishing trick. It was one of the standing tricks. [292]

"Q—Was a net used for any part of her show while she was with the Ringling show?

"A—No.

"Q—Now back to the time of the accident, what did you observe with relation to the trapeze itself immediately after she fell therefrom?

"A—I didn't observe anything unusual. The trapeze was swinging.

"Q—Was it level or was one side lower than the other?

"A—To my best knowledge and belief, it was level. It would be very difficult to say that with the trapeze swinging.

(Deposition of Pat Valdo)

“Q—But you believe it was level, is that correct?

“A—Yes.

“Q—Now, when Miss Olvera fell, what did you do?

“A—I had to remain in the seat. Her husband picked her up and carried her out, and I sent a boy out to find out how badly she was injured or just what had happened. The boy came back to me and said they were going to take her to the hospital. I had to stay there because I had to check up on the show that day.

“Q—For what reason were you checking that show?

“A—Possible material for Ringling Brothers.

“Q—Do you scout other shows other than the Barnes' show through the years?

“A—Yes, sir.

“Q—In fact, that is your field of operation, is [293] scouting and obtaining talent, is it not?

“A—Yes, sir.

“Q—What did you observe occurring about or near Miss Olvera immediately after the fall?

“A—Her husband picked her up and rushed her out of the ring.

“Q—How quickly after she had fallen?

“A—Immediately; as soon as he could get there.

“Q—How many seconds, if any, elapsed before he picked her up and carried her out in that manner?

“A—Well, that would be very difficult, to name the exact number of seconds. As fast as he could get from where he was standing over to pick her up. Possibly 8 or 10 feet, I would say, he was away from her.

(Deposition of Pat Valdo)

"Q—In any event, she was carried out promptly?

"A—Yes, sir.

"Q—When next after that did you see Miss Olvera?

"A—At the hospital.

"Q—Where? In Anthony, Kansas?

"A—In Anthony, Kansas.

"Q—At what time?

"A—It was after the matinee performance.

"Q—Who was present?

"A—I think Miss Bradner and Mr. Graves. I am not sure. I am sure Miss Bradner was *there*."

(The Court, after admonishing the jury took an adjournment until 2:00 o'clock p. m. of the same day.)
[294]

Afternoon Session

2:00 o'clock.

(Stipulated that the jurors were present and in their box.)

(Reading of the testimony of *Pete Valdo* resumed.)

"Q—Was Mr. Pollinger there?

"A—He came in later, I believe.

"Q—On what day was that? Was that the same day of the accident?

"A—Yes, sir.

"Q—Was anything said at that time by you and was anything said by Miss Olvera?

"A—Do you want me to relate the conversation?

(Deposition of Pat Valdo)

"Q—First say whether anything was said or not.

"A—Well, I expressed my sympathy for her as well as I could on such an occasion.

"Q—Just say 'Yes' or 'No.' There was something said?

"A—Oh, yes.

"Q—Now relate the conversation to the best of your recollection.

"A—Well, I expressed my sympathy. America looked very forlorn. She told me her elbow was dislocated, and I told her not to worry.

"Q—Did she say anything else?

"A—Not that I recall. Just a usual conversation. [295]

"Q—Did she say anything else that you recall particularly?

"A—Not that I remember, no, sir.

"Q—I will ask you whether or not Miss Olvera said this to you, and you answered as I will read? I am now reading from page 89, lines 23 to 25, of the transcript in this case: 'Mr. Valdo, wasn't that awful, that hook trapped me out?' To which you are supposed to have answered, 'Yes, America. It was awful.'

"Did you say that and did she say that at that time?

"A—No, sir.

"Q—Or anything like that?

"A—No, sir.

"Q—Did you hear any noise or snap at the time of this accident?

"A—No, sir.

"Q—Are there any other details that you can think of at the moment that have escaped you that you would like

(Deposition of Pat Valdo)

to relate to the jury respecting this particular accident and the accident itself?

"A—The only thing I can say is that the apparatus looked absolutely normal. Nothing noticeable to me.

"Q—Nothing noticeable about it at all?

"A—Not to me.

"Q—That is all. [296]

"Q—By Mr. Marcus: Did you say that you did not engage Miss America in 1936?

"A—Yes, sir.

"Q—Is it not a fact that you told Miss America that when you returned from Europe you would engage her services at that time?

"A—No, sir. May I explain this situation? Miss America came to the circus and Mr. Gumpertz wanted to see her act. I left immediately after the circus closed for Europe. While I was in Europe Mr. Gumpertz had seen Miss Olvera's act and wrote me and said 'For your information, I have engaged America Olvera.' When I returned from Europe he told me he had engaged her and at what salary. I issued the contract, gave it to Miss Olvera, Miss Olvera signed it, Mr. Gumpertz signed it, and she was given her copy and we kept our copy.

"Q—Well, the contract was not signed until you returned, is not that a fact?

"A—That is a fact, yes.

"Q—And is it not a fact that before Mr. Gumpertz had authority to employ anyone, you had to approve of the employment?

"A—No, sir. Mr. Gumpertz was the general manager. I took my orders from him.

(Deposition of Pat Valdo)

"Q—Is it not a fact that you saw Miss America's act before you went to Europe? [297]

"A—No, sir.

"Q—Did you see her act after you returned from Europe?

"A—Yes, sir.

"Q—That was before the contract was signed?

"A—That I don't recall.

"Q—Is it not a fact that after you saw her act the contract was executed?

"A—I cannot recall that.

"Q—This contract was with Ringling Brothers, wasn't it?

"A—Yes. May I explain something now?"

Mr. Combs: Then skip to line 6:

"A—Mr. Gumpertz engaged Miss America. The engagement was possibly oral. The signing of the contract was a mere matter of form after I returned.

"Q—But the contract was not signed until you did return?

"A—No, sir.

"Q—At that time was her brother with the circus?

"A—Yes.

"Q—You said something about her having an accident in Madison Square Gardens. Were you there when it happened?

"A—Yes, sir.

"Q—Do you know how the accident happened?

"A—I didn't see the accident. I heard of it.

(Deposition of Pat Valdo)

"Q—That is what I asked you.

"A—You asked if I was in Madison Square Gardens. I was in the Gardens. [298]

"Q—You did not see the accident?

"A—No, sir.

"Q—You don't know how it happened?

"A—Only from hearsay.

"Q—Or in what manner it happened?

"A—Only from hearsay.

"Q—You say you are a talent scout?

"A—Talent scout, and I arrange the programs and direct the performances during the summer.

"Q—You tell the people where to go?

"A—I send out their acts.

"Q—You send them to wherever you want to?

"A—I employ them only for the Ringling Circus.

"Q—You employ them only for the Ringling Circus, but you send them out to wherever you want them to go?

"A—No, sir.

"Q—Didn't you send Miss America to the Barnes show?

"A—Yes.

"Q—Did you send the Christianas to the Barnes show?

"A—Yes.

"Q—Didn't you send Bert Nelson to the Hagenback-Wallace show?

"A—Yes.

"Q—Didn't you send Hal Silver to the Barnes show?

"A—Yes.

(Deposition of Pat Valdo)

“Q—Those were all under contract with Ringling Brothers, [299] were they not?

“A—No. Excuse me—

“Q—Well, weren’t they?

“A—No, sir.

“Q—Didn’t you employ people for the Barnes show, too?

“A—Sometimes.

“Q—Well, I mean the shows I mentioned, the Barnes show, the Hagenback-Wallace, and the Ringling show.

“A—Yes.

“Q—And those were under contracts they signed with Ringling, were they not?

“A—Not always, no.

“Q—In what instances I have mentioned did you or did you not send these acts to the other shows on Ringling Brothers contracts?

“A—Well, Nelson didn’t have a Ringling contract. He had a Hagenback-Wallace contract.

“Q—You are not sure of that, are you?

“A—I could not swear to it, no.

“Q—Now, at the time you went to the Barnes show at Anthony, Kansas, you had requested him to go there, hadn’t you?

“A—No, sir.

“Q—Didn’t you have a conversation with Bert Nelson and you told him that you would go over to the Barnes show and meet him at Anthony, Kansas? [300]

“A—We went over there together to the Barnes show.

(Deposition of Pat Valdo)

"Q—You say you went to look over the acts?

"A—Yes, sir.

"Q—You had nothing to do or no connection with the Barnes show at all?

"A—Mr. Cronin was the manager. My only connection was sending acts there occasionally.

"Q—Do you have anything to do with the show itself?

"A—No.

"Q—You didn't arrange any programs for them?

"A—Arrange their programs?

"Q—Yes.

"A—If the programs would work that way.

"Q—If it worked you sent it?

"A—Yes.

"Q—And you did send some, didn't you?

"A—Programs?

"Q—In the 1926 and 1937 season?

"A—Yes, sir.

"Q—You say you went to the Barnes show to find out if there were any acts on there that you could use in your circus?

"A—Yes, sir.

"Q—Isn't it a fact that all the acts you had sent to the Barnes show?

"A—No. [301]

"Q—Was Hal Silver performing there?

"A—Yes, sir.

(Deposition of Pat Valdo)

“Q—Didn’t you engage Hal Silver?

“A—No, sir.

“Q—You did not?

“A—No, sir.

“Q—Do you know who engaged him?

“A—Mr. Cronin.

“Q—Do you know who engaged Bert Nelson?

“A—Yes, sir.

“Q—Was he performing?

“A—Was he performing where?

“Q—That year, for the Barnes show?

“A—He was engaged before that, with the Hagenback show.

“Q—Did you engage him?

“A—Mr. Gumpertz engaged him.

“Q—You say you did not?

“A—Positively not.

“Q—He was engaged by the Ringling show, wasn’t he?

“A—No, he was engaged by Mr. Gumpertz for the Hagenback-Wallace Circus.

“Q—He was engaged by the Ringling show under a Ringling contract, wasn’t he?

“A—No.

“Q—Are you sure of that?

“A—I won’t be sure of the contract. I am sure of the [302] circus.

“Q—He went to the Hagenback show, you say?

“A—Yes, sir.

(Deposition of Pat Valdo)

"Q—You don't know whether he had a Ringling Bros. contract or not?

"A—Yes, sir—may I explain something?

"Q—Go ahead.

"A—We were in Los Angeles with the Ringling Bros. circus when I heard about Bert Nelson, and Mr. Gumpertz and I went—I can't recall the address. He would know it—to see him work one animal. Mr. Gumpertz saw him work the animal and then engaged him.

"Q—With a Ringling Bros. contract?

"A—That I don't recall. I don't think he was contracted at that time.

"Q—You say he had a Hagenback-Wallace contract?

"A—When the Hagenback-Wallace show was in existence.

"Q—It isn't in existence now?

"A—No.

"Q—And you did engage people for the Hagenback show?

"A—Yes.

"Q—And did you engage people for the Barnes show, too?

"A—Not all of them.

"Q—I didn't ask you all of them. Did you engage people for the Barnes show?

"A—Yes. [303]

"Q—Who did you engage?

"A—What year?

"Q—1936 and 1937.

"A—I will have to think a little bit now.

(Deposition of Pat Valdo)

“Q—All right.

“A—Miss Olvera was engaged in 1937 by me, and the Christiana family.

“Q—You engaged them for the Barnes show?

“A—The Christiana family were first engaged by the Hagenback Circus.

“Q—I am talking about the Barnes show.

“A—That year?

“Q—Yes.

“A—Yes.

“Q—But you gave her a Ringling Bros. contract, didn't you?

“A—Yes, sir.

“Q—And the same is true with the Christianas?

“A—I believe that the Christianas had a Barnes show contract.

“Q—And you engaged them, didn't you?

“A—Yes, sir.

“Q—Then you were a managing director of the Barnes show, too, weren't you?

“A—No, sir.

“Q—What else did you do besides arrange programs and supply people? [304]

“A—I occasionally sent people out there for the show.

“Q—When did you send Bert out there?

“A—I would have to look that up.

“Q—He was there in 1936 and 1937?

“A—I don't know whether he was there in 1936 and 1937.

(Deposition of Pat Valdo)

"Q—He was if he was there during the time Miss America was there?

"A—Yes, that is right.

"Q—That was the 1936 or 1937 season, isn't that true?

"A—That was either the 1936 or 1937 season.

"Q—At the time Miss America was injured you knew he was there, didn't you?

"A—Yes.

"Q—And if he was there, and you know he was there, you engaged him to go there, didn't you?

"A—Mr. Gumpertz engaged him.

"Q—Did you send him there?

"A—Did I send him there?

"Q—Yes.

"A—Under Mr. Gumpertz's instructions.

"Q—And the Christianas?

"A—The same holds true with the Christianas.

"Q—You saw them perform on the day of the accident?

"A—Yes, sir.

"Q—You sent them there, did you?

"A—To the Barnes Circus? [305]

"Q—Yes.

"A—Yes.

"Q—And you engaged them?

"A—Yes, sir.

"Q—And Miss America the same, is that right?

"A—Yes.

(Deposition of Pat Valdo)

“Q—And how about Hal Silver?

“A—Silver was first engaged with the Barnes show by Mr. Cronin.

“Q—Was he ever with the Ringling Bros. show?

“A—After. That is why I saw the show. After I saw Mr. Silver work with the Barnes show I took him with the Ringling show.

“Q—That is one out of the three?

“A—Well, we had the Christianas with the Ringling show before that.

“Q—That is what I say. You had Miss America?

“A—Yes.

“Q—And you had Bert Nelson?

“A—With the Hagenback show.

“The Court: While he was under contract did you take him with the Ringling show?

“A—Who is that?

“The Court: Silver.

“A—No. That was under another contract. There was a year intervening before we took him. [306]

“Q—By Mr. Marcus: You say you were sitting in the grandstand?

“A—Yes, sir.

“Q—You had seen her perform her act many times before, hadn't you?

“A—Yes, sir.

“Q—You were acquainted with her act?

“A—Yes, sir.

(Deposition of Pat Valdo)

"Q—You knew that her husband pulled her out on the swing to get her started?

"A—That day, yes, sir.

"Q—Before that?

"A—Before that; no, she wasn't married when she was with the Ringling Circus.

"Q—Do you know that anybody pulled her out?

"A—You mean swing her?

"Q—Swing her; start her?

"A—Yes.

"Q—Then they stepped out of the ring?

"A—Yes, sir—no, they stepped out of the way of the trapeze.

"Q—Then did she continue to swing to get momentum?

"A—Yes, she worked up the swing herself.

"Q—That is right. Then she would step on the bar, wouldn't she, to stand up?

"A—She is always on the bar. [307]

"Q—To stand up on the bar?

"A—Yes, sir.

"Q—And at that time she was sitting down. When the swing would start she would be sitting down?

"A—Yes, sir.

"Q—Then after the party would leave the rope, who assisted her in swinging, she would swing out herself to get momentum, is that correct?

"A—Yes.

"Q—And she would stand up on the bar. Do you remember that?

"A—Yes.

(Deposition of Pat Valdo)

"Q—Then she would look up and put her arms out, as she indicated here?

"A—I don't remember the looking up.

"Q—You don't remember her looking up at all?

"A—No.

"Q—At any other time previous do you remember her looking up?

"A—I wouldn't notice a motion like that. I don't think that would be noticed.

"Q—You don't remember seeing her?

"A—No.

"Q—At any other time?

"A—No.

"Q—Did she stand up on the trapeze the day of the acci- [308] dent happened?

"A—Well, she usually did. She did her regular routine; as far as I recall she did.

"Q—And as she stood up, she fell, is that right?

"A—No, sir.

"Q—When did she fall?

"A—She fell as she was on her knees, swinging.

"Q—Do you remember how it happened?

"A—Yes, sir.

"Q—Exactly?

"A—Nobody knows how that accident happened, exactly.

"Q—Do you remember it?

"A—I remember. To the best of my knowledge she was on her knees swinging, just before she did her handkerchief trick.

(Deposition of Pat Valdo)

"Q—She hadn't stood up at all?

"A—She stood up previous to that. She stood up and then came down with her knees.

"Q—Was she standing up when she fell?

"A—On her knees.

"Q—She wasn't standing up then?

"A—She was on her knees.

"Q—That was the trick she described here in court, then, when she fell?

"A—I don't remember that.

"Q—You don't remember what trick she was doing when [309] she fell?

"A—On her knees. Swinging on her knees.

"Q—Isn't it a fact that she was swinging out, getting momentum, when the trapeze reached its ultimate swing and she began to stand up in that trick?

"A—I couldn't say. I don't recall.

"Q—You don't remember that?

"A—No, sir.

"Q—You were observing her that time while you were in the grandstand?

"A—I was looking at her. There were two other acts on the same time.

"Q—You were looking at the other acts, too?

"A—Occasionally.

"Q—You knew her act?

"A—Yes, sir.

"Q—Did you know the other two acts?

"A—Yes.

(Deposition of Pat Valdo)

“Q—You had seen them?

“A—They were little acts.

“Q—Who were they?

“A—One was Bertha Matlock, I think. I don’t recall who that was.

“Q—Do you remember that act?

“A—No.

“Q—Was that ever with the Ringling Bros. show? [310]

“A—No.

“Q—How about the third act that was there?

“A—I do not recall who that was.

“Q—Do you remember the performance that was given?

“A—Yes, they were trapeze acts.

“Q—Did you see them perform?

“A—I saw two acts in there, yes, sir.

“Q—And you came there to see acts that you had never seen before, is that right?

“A—Yes, sir.

“Q—Had you seen these acts before?

“A—Yes.

“Q—Where?

“A—At the Barnes show. They had been there for years.

“Q—You had been to the Barnes show before?

“A—Oh, yes. Not that season, but every year since—

“Q—You were watching the other acts?

“The Court: Since what?

(Deposition of Pat Valdo)

"A—Since the Barnes show was sold from Al G. Barnes. Then I had seen it when Al G. Barnes was the manager. I had been there and seen it.

"Q—How far were you sitting from the center ring?

"A—Well, I would say the hippodrome track is approximately twenty feet wide, the ring would be about thirty-six feet wide. She was possibly forty-three or forty-five feet.

"Q—Up to the grandstand? [311]

"A—From where I was sitting to the ground under her trapeze.

"Q—You were sitting in the grandstand?

"A—Yes, sir.

"Q—The same as the other spectators were in the grandstand?

"A—Yes, sir.

"Q—Where was the band located?

"A—Opposite; on the opposite side of the tent.

"Q—Was the band playing?

"A—Yes, sir.

"Q—Do you know whether you heard any snap of the trapeze at the time she fell?

"A—No, sir.

"Q—Your answer is you don't remember?

"A—I didn't hear any.

"Q—You didn't hear any?

"A—No, sir.

"Q—And afterwards you looked at the trapeze, did you?

"A—Yes—I won't say I did. I can't recall that.

(Deposition of Pat Valdo)

“Q—You don’t remember whether you looked at it or not?

“A—No.

“Q—So you wouldn’t know whether one side was lower or the other side was lower, would you?

“A—No, sir.

“Q—You didn’t go down to see her when she was lying [312] there, did you?

“A—On the ground?

“Q—Yes.

“A—No, sir. They took her immediately to the doctor’s tent.

“Q—When she was in the doctor’s tent you didn’t go to see her?

“A—No.

“Q—You had known her about four or five years before?

“A—Yes.

“Q—She had been with your circus for some time?

“A—Yes. May I explain that answer about not going to the doctor’s tent?

“Q—All right.

“A—Usually the doctor objects to people going in there right after an accident. The tents are very small, and that was—

“Q—Well, how long after she entered the hospital did you go to see her?

“A—The minute the matinee was over.

“Q—Did you hear her holler while she was lying there?

“A—No.

(Deposition of Pat Valdo)

"Q—You didn't hear her say anything?

"A—No.

"Q—Did you see her lying there, from the grandstand?

"A—This all happened so quickly. She couldn't have [313] laid there over three or four seconds; as fast as her husband could get to her and get her out.

"Q—Do you remember the Indian chief going out with her?

"A—No, sir.

"Q—You say her husband took her?

"A—Yes.

"Q—And you went to the hospital to see her?

"A—Yes, immediately after the matinee was over.

"Q—What was her condition at that time?

"A—She was in bed, and she told me—

"Q—What was her condition? Was she conscious or unconscious?

"A—She was conscious.

"Q—She talked to you?

"A—Yes.

"Q—Did she say, 'The trapeze threw me out'?

"A—I don't recall it.

"Q—Is your testimony now that you don't recall it?

"A—She did not say it.

"Q—Do you recall anything else she said at that time, besides what you have related here?

"A—I don't know. That is three years ago.

"Q—You did talk to her, though?

"A—Yes.

(Deposition of Pat Valdo)

“Q—You did have a further conversation, other than what you have related here? [314]

“A—I expressed my sympathy. I was very sorry for her. I told her not to worry.

“Q—There was further conversation, wasn't there?

“A—I don't think so. I wasn't in the hospital very long.

“Q—Did you see her after that?

“A—Yes, sir.

“Q—Where?

“A—Houston, Texas.

“Q—She came to talk to you, didn't she?

“A—Yes, sir.

“Q—You haven't engaged her since that time, have you?

“A—We offered her an engagement after that.

“Q—She asked for a job, didn't she?

“A—Yes, sir.

“Q—And you offered her a position?

“A—Yes, sir.

“Q—You know she tried, don't you, to perform her act? Was she employed by you?

“A—After that? After the accident?

“Q—Yes.

“A—No, sir.

“Q—Do you know why?

“A—She said she wasn't able to work.

(Deposition of Pat Valdo)

“Redirect Examination

“Q—By Mr. Combs: Referring to this experience when you saw her at Houston, will you state how she appeared to [315] you at that time? In other words, did she come to you being carried by someone or did she come walking herself?

“A—She walked.

“Q—And she came and saw you in person there?

“A—Yes, sir.

“Q—Walking?

“A—Yes, sir.

“Q—Was anyone with her?

“A—No, sir.

“Q—On the day of the accident, or about the time thereof, did you observe Mr. Pollinger in the ring or near the ring?

“A—Yes, sir.

“Q—Did you observe whether or not he inspected the rigging on that day, the rigging of the act?

“A—I did not.

“Q—How did it happen that you observed him?

“A—In the ring?

“Q—Yes.

“A—The way he was dressed.

“Q—How was he dressed?

“A—He had on a bathrobe.

“Q—Referring to the acts in the Barnes Circus, there were a great many other acts; by that I mean 20 or 30 other acts, or maybe more than that, other than those three or four acts referred to by counsel, were there not? [316]

“A—Yes, sir.

(Testimony of Robert Thornton)

“Q—Can you fix approximately the number of acts there were on the Barnes show on the 12th of September, 1937, to the best of your recollection?

“A—There were possibly a hundred performers.

“Q—A hundred performers?

“A—Yes, sir.

“Q—And of those hundred performers, do you have any idea how many you engaged for the Barnes show?

“A—Miss Olvera, the Christianas, and Bert Nelson.

“Q—And those three were all; and Bert Nelson was engaged in the manner you have related, with Mr. Gumpertz?

“A—Yes, sir.

“Q—Out of a hundred, those were the only ones you had anything to do with?

“A—The only three who were not engaged by Mr. Cronin.

“Cross-examination

“Q—Mr. Valdo, did America Olvera ever state to you at any time that her accident was caused by any failure of apparatus?

“A—No, sir.

“Q—Do you mean to state, Mr. Valdo, that Miss America never at any time stated to you that it was the fault of her apparatus that threw her out?

“A—No, sir.

“Q—She did tell you, didn't she? [317]

“A—No, sir.

(Deposition of Pat Valdo)

"Q—Did you understand my question?

"A—I understood you to ask me if Miss Olvera ever mentioned to me if there was any question about the hook on her apparatus.

"Q—That the apparatus had thrown her out.

"A—No, she never mentioned it.

"Q—She at no time stated to you that she fell from the apparatus because the apparatus was not set up properly?

"A—The first I heard of that claim was after the season was closed and she was in Baldwin Park.

"Q—Then you did hear it, didn't you?

"A—After the season was closed. She didn't say it to me personally; not directly. I didn't see Miss Olvera from the time the season closed at Houston, Texas, until in this courtroom.

"Q—How long was she in Houston?

"A—I don't recall. I think one day.

"Q—She only came there to ask you for employment?

"A—She saw the performance and was around the show visiting friends.

"Q—And you only saw her on two occasions after the accident?

"A—Yes, sir.

"Q—One was at the hospital?

"A—Yes. [318]

"Q—You have related the conversation between you there?

"A—Yes.

"Q—And the time at Houston?

"A—Yes, sir.

(Deposition of Pat Valdo)

"Q—And at that time she came to ask you for employment, didn't she?

"A—I don't recall that. You see, I do business at that time of the year with four hundred or five hundred artists, and I must depend on my letters and correspondence. It is impossible to remember the conversations.

"Q—So you don't remember the conversation at that time?

"A—So far as I remember, she did talk about the next year, and I told her that so far as I was concerned she could always have a place, and I would take it up with Mr. Gumpertz. I believe the correspondence will bear that out.

"Q—But so far as the conversation was concerned, you do not know now definitely what the whole conversation was?

"A—In a general way, yes, I do. Definitely, not.

"Q—You say that there were 100 performers with the show?

"A—Approximately.

"Q—How many acts were there?

"A—Well, that would be very difficult to say. The program is right there for that season.

"Q—Do you know?

"A—I could look at the program and tell you the exact number. [319]

"Q—I am asking you if you know.

"A—No, sir.

"Q—Could you tell approximately?

"A—Acts?

(Deposition of Pat Valdo)

“Q—Acts, yes.

“A—Well, I would have to have a little time on that.

“Q—Well, just say whether you can remember or cannot remember. You don’t remember?

“A—No.

“Redirect Examination

“Q—You said approximately 100 acts.

“A—Performers.

“Q—That is all of this witness.”

Mr. Combs: If your Honor please, at this time I would like to offer as defendants’ exhibit the contract heretofore offered by plaintiff in this matter.

The Court: You don’t need to offer it if it is already in evidence.

Mr. Combs: Very well, I would like to read it.

The Court: I recall that the contract is rather closely printed, and has two pages. I would suggest that you just read the parts that you believe are pertinent. If you think it is all pertinent, read it all.

Mr. Combs: I do think it is all pertinent, your Honor.

The Court: It may be turned over to the jury when they retire to deliberate, but use your own judgment. [320]

Mr. Combs: All right. This is Artist's Independent Contractor Agreement. I am now reading Plaintiff's Exhibit No. 1:

"This Agreement made at as of Sarasota, Fla., this 24th day of September, 1936 between Ringling Bros.-Barnum & Bailey Combined Shows, Inc., hereinafter called the Show, and

"America Olvera

hereinafter called Artist—

"Witnesseth:

"1. For the lump sum of Eighty (\$80.00)..... dollars per week, payable weekly for the season of 1937 commencing on or about ————— the Artist sells to the Show his act, and in addition to said sum accepts without charge from the Show (while under canvas) meals, car-lodging and transportation, common and customary in the circus business. The Artist represents that his act in the matter of props, apparatus, property and personnel is as hereinafter set forth; and shall be maintained as is, and as represented, throughout the season, to wit:

"(Insert names of artist, troupe members; give description and detail of act.)

"America Olvera to present balancing trapeze act of the same standard as presented during the season of 1936
"A Charge of Five Dollars Weekly Will Be Made for Each Dog or Animal Pet Carried With the Show.

"It is also agreed that if the Artist is re-engaged for [321] the following season he shall not appear at any other circus, theatre or Wild West show in the United States without the written consent of the Show.

(Plaintiff's Exhibit No. 1)

"The term 'season' represents the operating period as fixed by the Show and compensation to the Artist is definitely understood as a lump sum for the season. Because of inability of the Show to determine with exactness in advance the length of the season, installment payments to the Artist are made on a weekly basis.

"The word 'Artist' where herein used shall embrace and include his entire act inclusive of the Artist and the personnel of his troupe.

"(a) The option is given the Show to renew this contract for the next succeeding 'season' upon same terms and contract price, by giving notice to Artist 30 days prior to closing date; and the Show by agreement reserves the right to transfer and place the Artist during the term or part term of this contract, with any other of its shows or circuses—under its ownership or management—all the terms and conditions of this contract continuing, prevailing and obtaining.

"2. It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc., are changes exclusively under control of, and for the convenience of, the Artist, and in no particular modify or [322] restrict the Artists relations with the Show as independent contractor; and that the privileges offered Artist by the Show for meals, car-lodging and transportation are optional, of which Artist at all times has the privilege of rejecting and enjoys without restriction the freedom of procuring elsewhere or otherwise his meals, lodging and transportation.

(Plaintiff's Exhibit No. 1)

"3. Twelve performances on secular days (together with Sunday performances when given) shall constitute one week's work.

"Payment to the Artist shall be reckoned only from the date of the first public performance. The Artist shall receive no payment for rehearsals during or previous to this engagement; nor for any performances omitted, from whatever cause, during the season.

"The Show shall hold back one week's payment of the Artist as a guarantee of good faith.

"4. Upon the termination of this agreement from any cause, no claim shall be made by the Artist for the use of his or any name, lithograph, poster or other printed matter used thereafter.

"5. Animals or pets not used in performances will not be allowed or carried unless by special permit of the Show; and then only upon payment of ten dollars a week for each animal or pet so carried.

"6. The Artist shall at all times and places produce [323] and present his act to the entire satisfaction of the Show.

"7. The Artist's engagement with the Show is exclusive, and his act and presentation are represented as special, unique and extraordinary. During the contract period the Artist is prohibited from engaging or appearing with any other circus or wild west Show in the United States. For any violation of this clause, the Artist agrees that injunction or other adequate remedy restraining the Artist

(Plaintiff's Exhibit No. 1)

from performing for any other circus or wild west show before the completion of this contract, may issue out of any court of competent jurisdiction, and the Show shall be entitled as liquidated damages, to a sum equal to double the amount of the Artist's compensation for the unexpired period of contract.

"It is expressly agreed and understood that if the Show engages the Artist for the season of 1938 the Artist shall not perform in New York City between the closing of the Show of the season of 1937 and the beginning of the season of 1938 without the written consent of the Show.

"8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the 'act' by reason of the Artist's skill constitutes a 'feature' performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act. [324]

"The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same.

(Plaintiff's Exhibit No. 1)

"Independent Contractor

"9. The Artist under this contract is an independent contractor, and seeks and accepts employment as such, anything herein contained to the contrary notwithstanding.

"10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement of this contract, be determined.

"11. The Artist Understands, Recognizes and Confirms that

"(a) The Show is transported by the railroad, not as common carrier, but by private arrangement and

"(b) That to affect transportation of its outfit the Show releases the railroad for claim or liability for all damages to persons or property of whatever nature, of both [325] Artist and Show; and

"(c) That the Artist in accepting from the Show meals, car-lodgings and transportation on its circus train receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release of claim for damage of every nature and description that he may have during or after the period of performance, under this contract, against all transporting railroads and the Show.

(Plaintiff's Exhibit No. 1)

"12. Now, Therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants, and any transporting railroad company handling the Show's circus train movements, of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during period of performance under this contract; and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract.

"The Artist declares that he has read—heard read the foregoing contract and understands the same.

"In Witness Whereof, the above named parties have hereunto set their hands and seals. [326]

"Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

"By (Signed) S. W. Gumpertz,

(Signed) America Olvera,

Artist.

Artist's Permanent Address:

226 50th St. New York City."

Mr. Combs: We will call Mr. Thornton.

ROBERT THORNTON,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Your full name?

A. Robert Thornton.

Direct Examination

Q. By Mr. Combs: Where do you reside?

A. 1621 Washington Boulevard, Venice.

Q. By whom are you employed at the present time?

A. At the present time I am not working; unemployed.

Q. Have you been engaged heretofore in the circus business?

A. Yes, sir.

Q. Were you at any time employed by the Barnes circus?

A. Yes.

Q. When. [327]

A. In 1907, until about 1938.

Q. Approximately 31 years?

A. Yes.

Q. Prior to that time were you in the circus business?

A. Prior to 1907?

Q. Yes.

A. I was in the carnival business.

Q. Subsequent to 1938 were you in the circus business?

A. Yes.

(Testimony of Robert Thornton)

Q. Until when?

A. Well, I was in the show business and carnival business from 1903 to 1907; in the circus business from 1907 until 1938.

Q. During all that later time you were with the Barnes circus?

A. Yes, from 1907.

Q. What was your position with the Barnes circus in 1937, when Miss Olvera's act took place?

A. I was the equestrian director.

Q. Will you explain to the jury what an equestrian director is in the circus?

A. The equestrian director has charge of the performance, to see that the acts get in and go out on time.

Q. Were you also the ringmaster?

A. The equestrian director and ringmaster is the same thing. [328]

Q. How long have you been the equestrian director?

A. Since 1912.

Q. Were you present in the big top of the Barnes circus at the time of the accident in this case?

A. Yes.

Q. Where were you then?

A. Standing behind the middle ring alongside of the band.

Q. Were you anywhere near the ring occupied by Miss Olvera at that time?

A. Well, I was standing behind the center ring, that is, about 40 feet from where she was working.

(Testimony of Robert Thornton)

Q. Was her trapeze hanging in the middle of that ring?

A. Yes, sir.

Q. On that occasion did you have an opportunity to observe her trapeze while hanging in the air, before her act?

A. Yes.

Q. Will you state to the jury what you observed in that connection?

A. Nothing out of the ordinary.

Q. Did you see Mr. Pollinger in the big top at the time Miss Olvera's trapeze was hung?

A. Yes.

Q. Where was he?

A. In there, directing the men.

Q. Which men?

A. The rigging men, put their traps up. [329]

Mr. Marcus: I move that the word "directing" be stricken as calling for his conclusion.

The Court: It may go out, and the jury instructed to disregard it.

Q. By Mr. Combs: What was he doing with relation to the men?

A. He showed the men how to hang the traps; pull them up in the air.

Q. Just how soon, or how long prior to Miss Olvera's act did Pollinger come into the tent?

A. Well, it was just before the act,—about two minutes before.

(Testimony of Robert Thornton)

Q. And what did he do when he came into the tent?

A. He waited there until it was time to set their act.

Q. And by setting their act, what do you mean?

A. When they set their act, he goes in with the rigging men; gets the blocks and falls that are hanging there from the center poles; hang their traps, and then pull them up in the air, to get them up.

Q. Part of that time are they hanging over to the side out of the way of the other performers?

Mr. Marcus: If your Honor please, that is not what the witness said.

Mr. Combs: I will withdraw the question. It is leading and suggestive.

Mr. Marcus: It is more than that. [330]

The Court: It is withdrawn. Let us not enter into a controversy.

Q. By Mr. Combs: What did Mr. Pollinger do when the trapeze was pulled up?

A. He would guy them out.

Q. This is particularly on the day of the 12th of September, 1937.

A. Well, he was there every show.

Q. Was he there every day?

A. Yes.

Q. Doing these same things?

A. Yes.

Q. Did he do anything with relation to the guy lines on the date of September 12th?

A. Well, after guying them, guying out the guy lines, he goes around shaking the guy ropes, to see if they are tight enough.

(Testimony of Robert Thornton)

Q. Subsequent to that, will you relate what transpired in connection with Miss Olvera's act? I will withdraw the question. What happened then, in so far as Pollinger was concerned, in relation to Miss Olvera's act?

A. When he gets through seeing if it is tight enough, then she goes up to do her act. He takes her cloak off, or whatever she is wearing, and she goes into the ring. He hands the cloak to the property man, and then he goes in and helps her up. [331]

Mr. Marcus: I understand, your Honor, this is directed to the date this accident happened?

Mr. Combs: That is right. That is my question.

Q. Did he do that on that day?

A. Yes.

Q. Did he do anything else other than that?

A. Then, after she gets up in the trapeze—

The Court: Mr. Thornton, this question is directed to what happened on that particular day. Did you see what he did then? Did Miss Olvera, after the matters you have referred to, get up on the trapeze?

A. Yes, sir.

The Court: Go ahead.

Q. By Mr. Combs: How did she get up on the trapeze?

A. The men pulled her up.

Q. By what means?

A. I don't remember that day whether they pulled her up in the trapeze, or whether she climbed up. Sometimes they go hand over hand, and sometimes they pull her up with her foot in the rope.

(Testimony of Robert Thornton)

Q. Did anything unusual occur on that particular day in relation to her act, that you observed?

A. No.

Q. Did anything call your attention to it toward the end of the act?

A. No. [332]

Q. Miss Olvera fell from her trapeze?

A. Yes, she fell.

Q. Explain just what you observed in that connection.

A. After that I saw her, she was on her hands and knees, swinging, then out she came.

Q. What happened to her when she came out?

A. She lit on the ground.

Q. Explain a little more fully what you mean by she came out.

A. She just fell out of the trapeze.

Q. From what part of the trapeze?

A. She was on her knees. She did the trick there; I think it was her finishing trick, when she put the handkerchief on the bar.

Mr. Marcus: I move to strike out that it was her finishing trick, as calling for a conclusion.

The Court: I don't think it is material. The motion will be denied.

A. She would go on her knees, with the bar swinging, and the handkerchief on the bar, and then she reached down and got the handkerchief with her teeth. This day she did not have the handkerchief on the bar yet when she went out of the traps.

Q. By Mr. Combs: Where did she fall?

(Testimony of Robert Thornton)

A. It was outside the net they were holding.

Q. About how far outside of the net, if you know?

[333]

A. Pretty close to nothing.

Q. One or two feet?

A. I don't think it was that far. Maybe a foot.

Q. About a foot? Did you actually see her fall?

A. Yes, sir.

Q. Where were you when you saw her?

A. Upon the ringside at the band, behind the ring.

Q. About how far away was that from where she actually fell?

A. From where I was standing to where she lit on the ground. I imagine it would be 60 feet.

Q. You say you imagine? That is your best recollection of the event?

A. Yes, sir.

Q. Immediately after her fall, what happened to the traps?

A. The traps were let down.

Q. Who did that?

A. The rigging man.

Q. How soon after she fell?

A. Well. I don't suppose over a minute.

Q. Was there any particular reason for the removal of the traps immediately?

A. No; that was the ordinary time it takes.

Q. Did you see anyone approach Miss Olvera after the fall? [334]

A. No, sir.

(Testimony of Robert Thornton)

Q. Did you hear any noise in the tent, like the cracking of a chain, about the time she fell?

A. No.

Q. Was the band playing or not on that day?

A. The band was playing.

Q. How many rings were in the circus?

A. Three rings.

Q. With the customary paraphernalia of a three-ring circus?

A. Everything was there, yes.

Q. Thousands of items of property and hundreds of individuals?

A. Yes.

Q. How many people, approximately, were in the big top?

A. The audience?

Q. Yes.

A. Well, I should say at least 4,000. That is just a rough guess. I don't know how many were in the audience. I guess that many.

Q. Was there any difference in the manner in which Miss Olvera's rigging was erected or handled on the day of September 12th, 1937, from any other day of her performances theretofore?

A. No.

Q. It was handled in the same manner? [335]

A. In the same way.

Q. Was that likewise true in relation to the net under her?

A. Yes.

(Testimony of Robert Thornton)

Q. Will you describe that net as best you can?

A. I never measured it, but I imagine it was around 8 or 9 feet square, and all the ropes and holes were around it.

Q. Held by about how many men?

A. Ten men.

Q. Did they conduct themselves in any manner different on the occasion of September 12th, 1937 than they had six months preceding that date, in Miss Olvera's performances?

A. No.

Q. Just the same? A. The same way.

Q. And where was the net located with relation to the trapeze when it was standing stationary?

A. It would be directly under her.

Mr. Marcus: That is all.

The Court: What was the purpose of the net?

A. The purpose of the net was to catch her in case she fell.

Cross Examination

Q. By Mr. Marcus: Mr. Thornton, did you testify that Mr. Pollinger came out two minutes before, or about two minutes before, Mrs. Pollinger came out to perform her act? [336] A. No.

Q. You did not testify to that a moment ago?

The Court: The record will speak for itself.

Mr. Marcus: I want to be sure, because I want to base an impeaching question on that.

(Testimony of Robert Thornton)

The Court: If there is any question about it, perhaps you had better have it read. Mr. Thornton says now he didn't say it.

Mr. Combs: Let us have the last question and answer of the witness, because the question is compound.

Mr. Marcus: Strike it out. Did you so testify on direct examination?

Q. Did Mr. Pollinger come out two minutes before Mrs. Pollinger came out to perform her act?

A. Two minutes before they got ready to set her act, yes.

Q. Did he come out before she did?

A. No; they usually came out together.

Q. Then he did not come out two minutes before she came out to perform her act?

Mr. Marcus: That is not what he said; two minutes before they set her act.

The Court: Proceed. Answer the question.

A. What is the question?

(Question read by the reporter.)

A. They both came out together. [337]

The Court: Was that when he first entered the ring?

A. No, sir, they came in about two minutes; in time to set her act; then they waited until the act previous is finished, until they go in and set their act.

Q. Did they both come in together on the day when Miss Olvera fell? A. Yes, sir.

Q. Where did they come from, Mr. Thornton?

A. They came in the middle entrance, behind the band.

Q. From outside the main tent? A. Yes.

(Testimony of Robert Thornton)

Q. Was that the first time you saw Mr. Pollinger there that afternoon?

A. When he first came in, yes, sir.

Q. When the two of them came in together?

A. Yes.

The Court: Proceed.

Q. By Mr. Marcus: One act follows the other, doesn't it, in the circus, immediately? A. Yes, sir.

Q. You were engaged in an act immediately before their act, were you not, with some zebras?

A. No, immediately before their act is the clown number.

Q. You are sure of that, are you? A. Yes.

The Court: I think you had better refer to the [338] particular day. We don't want to take up time with the general situation, unless you refer to the 12th day of September.

Q. By Mr. Marcus: On the 12th day of September?

A. Yes.

Q. Were you not engaged in a zebra act on the 12th day of September, immediately before Miss Pollinger's act?

A. Immediately before Miss Pollinger's act was a clown number.

The Court: You remember that, do you?

A. Yes, sir.

Q. That was the same day of her act?

A. Yes, the clown number worked while they were setting her act.

(Testimony of Robert Thornton)

Q. By Mr. Combs: Do you remember testifying in this case at the previous trial, in this courtroom?

A. Yes.

Mr. Marcus: What page and line?

Mr. Combs: Page 391, line 3 and following.

Mr. Marcus: I will stipulate that he testified in conformity with the transcript, line 2 to the end of the page.

Mr. Combs: "A—The zebra act worked ahead of Miss Olvera's. Before the zebra act they hung her rigging and they pulled the guy ropes over away from the zebras, then they guyed it out after the zebras got through. [339]

"Q—All right; how much before her act was the zebra act?

"A—Before?

"Q—Before the zebra act.

"A—Her act before the zebra act?

"Q—Yes,

"A—No. The zebra act was before her act.

"Q—I say how much before her act was the zebra act?

"A—About five minutes.

"Q—And you were performing in that act?

"A—With the zebras?

"Q—Yes, the zebras.

"A—Yes, sir.

"Q—Was it at that time that her apparatus was put up?

"A—Yes.

"Q—Was that before or after Bert Nelson?

"A—After.

(Testimony of Robert Thornton)

“Q—Didn’t you testify on direct examination that two minutes before her act came on that her husband came out there to pull these ropes?”

Q. Isn’t it a fact, Mr. Thornton, that Miss Olvera’s trapeze went up in the big top when that big tent was set up?

A. Not the trapeze, no.

Q. It was not set up in the tent before?

A. Not the trapeze.

Q. When was the trapeze, to your knowledge, put up in the tent? [340]

A. Just before she did her act.

Q. How did they put the trapeze up in the top of the tent before she did her act?

A. The blocks and falls are already hanging there. They are put up when the tent is put up. Then they bring the blocks and falls over, and hang the trapeze on them, and pull it up in the air.

Q. Do you mean to say and to state now that her trapeze was not hanging there during the entire performance?

A. No.

Q. You had nothing to do with putting it up, did you?

A. I was the boss of the riggers.

Q. You had nothing to do with putting it up?

A. I had this much to do, that I was the boss of the show.

Q. You were the boss of the show?

A. The boss of the performers, and I saw that the act went in.

Q. You were the equestrian director?

A. Yes.

Q. That means blowing the whistle, doesn’t it, before an act starts?

A. Yes.

(Testimony of Robert Thornton)

Q. That was your duty, wasn't it? You were not boss of any performers, were you?

Mr. Combs: That is argumentative. [341]

The Court: Yes, that is argumentative.

Q. By Mr. Marcus: You remember every day that the apparatus was pulled up just a couple of minutes before she was to perform? A. Yes.

Q. And it didn't go up there at the time that the tent was put up?

A. The blocks and falls—

Q. I am talking about the trapeze.

A. The traps, no.

Q. Tell me how they hung that trapeze up there on the top of the tent, or the blocks and falls.

A. The blocks and falls are hung when they put the tent up. They bring the blocks and falls together, and put them up in the air.

Q. Where was the trapeze during the entire show?

A. Out in the back yard.

Q. Then what happened to it?

A. They would bring it in, and hang it up when she was ready to do her act.

Q. Who brings it in?

A. The property men.

Q. You saw them do that on this day? A. Yes.

Q. How long before she came on did you see them bring the trunk in? [342]

A. They have that sitting behind the ring, alongside of the band

(Testimony of Robert Thornton)

Q. The question is, how long before she did her act did you see them bring in the box?

A. I imagine five minutes before.

Q. You did see them bring it in on this particular day five minutes before, and what else did you see them do?

A. When it comes time for her act they bring the large box in and the traps, and hang it up in the air.

Q. Who hung the traps that day?

A. The rigging men..

Q. Who were they?

A. I don't remember the names.

Q. You saw them do it? A. Yes.

Q. But you don't remember their names?

A. I don't remember their names.

Q. But you saw them hang the traps? A. Yes.

Q. It was during the time you had this zebra act, was it? A. Just previous to that.

Q. When they were bringing in this box you were performing your zebra act, were you not? A. No.

Q. What else was going on in the ring at the time that Miss Olvera was performing? [343]

A. I don't remember whether there was an act in each ring or not.

Q. How is it you remember all the details about bringing in her box, and setting it up, and you don't even know whether there was another act in another ring?

Mr. Combs: I object to that as argumentative.

The Court: Sustained.

(Testimony of Robert Thornton)

Q. By Mr. Marcus: You don't remember whether there was another act in another ring or not?

A. No.

Mr. Combs: I object to that as having been already asked and answered.

The Court: It has been answered.

Q. By Mr. Marcus: What did you see Mr. Polinger do, if anything, that day?

A. He goes in with the rigging men, and shows them how to hang the rigging.

Q. Did you see that too? A. Yes.

Q. What else did you see?

A. He did that every show.

Q. This day I am talking about, did you see him do it on that day? A. Yes.

Q. What did you see him do?

A. They go in and hang the rigging. Then there are [344] four guy lines, two on each side the rigging, that are guyed down to the stakes in the ground, and he pointed to the one he wanted pulled on to tighten the trapeze.

Q. You saw him do that that day too? A. Yes.

Q. Then what?

A. When it was tight enough all he did was like that—meaning enough.

Q. By Mr. Combs: Indicating a motion with his hands.

Q. By Mr. Marcus: Yes. You saw him do that?

A. Yes.

Q. What day was that, by the way?

A. The day of the accident.

(Testimony of Robert Thornton)

Q. What day was it?

A. I just said it was the 12th.

Q. Is that the day? A. The date?

Q. That's right.

A. Well, I don't know whether it was the date or not. Only you said so.

Q. Do you remember what day of the week it was?

A. No, I don't.

Q. Go ahead, and tell me what else you saw.

A. When he got through guying out the traps, I already told you he took her cloak, and she went up to do her act.

Q. What kind of clothes did Mr. Pollinger have on? [345]

A. He had a bathrobe. What he had on underneath, I don't know.

Q. What color was the bathrobe?

A. That, I don't remember.

Q. Do you remember what color Miss Olvera's garments were?

A. No, I don't. She had quite a few of them. I don't know which one she was wearing that day.

Mr. Marcus: I presume you will stipulate he so testified, counsel, on page 395?

Mr. Combs: Yes, whatever is in the transcript, of course, counsel.

Mr. Marcus: "Q—You say he inspected the—or he went into the ring. What did he do in connection with her trapeze?

"A—He just saw that the men put it up right.

(Testimony of Robert Thornton)

"Q—What did he do?

"A—Well, that is a hard question to answer. He was in the ring with the men.

"The Court: Do you recall what you saw him do on that occasion?

"A—Well, at the time they are putting up the trapeze—

"The Court: No, I say do you recall what you saw him do on the occasion when she received her injuries?

"A—When she fell?

"The Court: Just before she fell. When you saw him come [346] into the ring there, what did he do? Do you recall what you saw him do?

"A—Well, as soon as the act is ready—

"The Court: No. On this particular occasion do you recall what you saw him do?

"A—Well, I don't quite get that question.

"The Court: Do you remember what you saw him do when he first came into the ring on the afternoon of the 12th of September, 1937, in Anthony, Kansas?

"Will you read the question, Mr. Reporter?

"(Question read by the reporter.)

"A—Well, I don't remember him doing anything out of the ordinary when he first came in, outside of—

"The Court: Do you remember what you saw him do? It isn't a question of what you don't remember, but do you remember what you saw him do?

"A—No."

Is that answer correct?

A. It must be, if it is there.

The Court: It has been stipulated that it is correct.

(Testimony of Robert Thornton)

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, your Honor. [347]

Mr. Marcus: It is part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I don't think the question is proper, your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when it had reached a certain position

(Testimony of Robert Thornton)

he held up his hand, and told them it was correct. That is my recollection [348] of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in mind the admonition of the court and return when called by the bailiff.

(The following proceedings were had in the absence of the jury):

Mr. Combs: That is not the proper manner to approach a question of that nature. It is for the jury to determine whether the witness has spoken the truth, if there is any conflict, and it is for the jury to determine whether there is a conflict. In this series of questions the court persistently asked questions, directing the witness' attention to certain things, and when the witness attempted to answer the answer was cut off by the court.

The Court: I don't know whether that is said as a criticism of the court. The court has a right at any time to ask the witness anything that is right in the presentation of the facts.

Mr. Combs: To permit a question like that by Mr. Marcus to be answered is highly improper, and it puts in the witness' [349] mouth a question for the jury to determine, to-wit, a question of fact. I can't argue any more; if the court's mind is against me, I might just as well reconcile myself to that, and sit down.

(Testimony of Robert Thornton)

The Court: Will you read the last statement, Mr. Dewing?

(Record read by the reporter.)

The Court: Do you mean as to the proper ruling?

Mr. Combs: Yes, your Honor.

The Court: The court's ruling was just about to be in your favor. You can always present anything to this court. I expect to have an open mind, and very frequently I have an opinion that a certain ruling should be made, and the argument of counsel has changed my views, because we are all attorneys, all officers of the court. As a matter of fact, I don't see why Mr. Marcus wants to ask the question, because it can only be asked as a matter of impeachment, and for no other purpose.

Mr. Marcus: I am going to withdraw the question. I was about to do it anyway, when counsed made the statement.

The Court: The court's mind is not foreclosed as to any ruling, until he is sure he is right. I don't believe you used your usual good judgment when you made that statement.

Mr. Combs: We are under some pressure, and I apologize, if anything I say is a little sharp; I don't really intend it that way.

The Court: I don't think you do. [350]

(Short recess.)

(The following proceedings were had in the presence of the jury):

The Court: The jurors are all present. Will it be so stipulated?

Mr. Combs: Yes.

(Testimony of Robert Thornton)

Mr. Marcus: We so stipulate, your Honor.

Q. Do you remembered when the zebra act, your zebra act, went on? A. Yes, sir.

Q. What acts were there prior to the zebra act?

A. If I remember right, it was the ponies. I wouldn't swear to it, though.

Q. Were there any other acts besides the pony act?

A. Before me?

Q. Before you.

A. No; if I remember right there was ponies in each ring, but I wouldn't swear whether the ponies were ahead of me or not.

Q. Miss Olvera's act followed yours, didn't it?

A. No, it did not follow me. I worked the zebras. Then there was the clown numbers, while they were setting her act.

Q. You were a equestrian director for some 30 years, am I correct? A. Yes.

Q. You don't remember now what the acts were at that time? [351]

A. No, I would have to have a pretty good memory to remember back a couple of years ago, and tell you just the act that was working in the circus. You have different acts every season, you know.

Q. Is it a fact that when you finished your act, the zebra act, they brought that trunk out, with the trapeze in it?

A. They did not always bring it in at the same time.

(Testimony of Robert Thornton)

Q. On this particular date?

A. On that particular day, as I was coming out of the ring, after working the zebras, while the clowns were working, they were bringing that in.

Q. You remember that distinctly now, do you, Mr Thornton? A. Yes.

Mr. Marcus: Counsel, do you stipulate that this is what he testified to, as appears in this transcript?

Mr. Combs: Yes, of course, I will stipulate, but I think you have read this all before.

“Q—you may go ahead.

“A—The zebra act worked ahead of Miss Olvera’s. Before the zebra act they hung her rigging and they pulled the guy ropes over away from the zebras, then they guyed it out after the zebras got through.”

A. Yes.

Q. Is that true? [352] A. Yes.

Q. Then they brought the box out and the trapeze before the zebra act, didn’t they?

A. If I remember, you asked me when they brought it in the tent.

Q. That’s right. A. Yes, before the zebra act.

Q. They would have to bring it in before they hung it, wouldn’t they? A. Yes.

Q. Did they bring it into the tent after your act was over? A. No, before the zebra act.

Q. Oh, before the zebra act? A. Yes.

Q. Is that correct now? A. Yes.

Q. Before the zebra act, what were you doing?

A. Standing by the bandstand.

(Testimony of Robert Thornton)

Q. Is that all? A. Yes.

Q. Do you remember anything else, besides standing by the bandstand?

A. No; that was my business, to stand by the bandstand, watching the show.

Q. On the date of this accident were you standing at the [353] grandstand?

A. Yes, the bandstand; not the grandstand.

Q. What was going on in the tent at the time?

A. Before her act?

Q. Before the zebra act.

A. Before the zebra act, if I remember right, it was the ponies. I am not sure.

Q. What? A. I think it was the pony acts.

Q. Wasn't it the pony act that went on after your act?

A. No.

Q. Now, tell me, Mr. Thornton, do you remember what happened that day at all? A. Yes.

Q. You do? A. Yes.

Q. Can you tell me now when this trapeze was brought out into the main tent?

Mr. Combs: That is objected to as having already been asked and answered many times.

The Court: Objection sustained.

Q. By Mr. Marcus: Mr. Thornton, did you see the act at all? A. The act?

Q. Yes. A. Yes. [354]

Q. Is your memory as clear of that act as it is when you stated when that trapeze was brought out?

(Testimony of Robert Thornton)

Mr. Combs: That is objected to as calling for a conclusion of the witness, and not proper cross examination.

The Court: It would not be calling for a conclusion, because we know that he would be the one to know whether his memory was as clear or not. It is argumentative. Objection sustained.

Mr. Marcus: I will withdraw that. That is all.

Redirect Examination

Q. By Mr. Combs: Mr. Thornton, you observed the trapeze immediately after Miss Olvera fell, did you not?

A. Yes, sir.

Q. How was it swinging, in what condition?

A. Just swinging straight.

Q. Was the trapeze bar level, or otherwise?

A. Level.

Mr. Combs: That is all.

Q. By Mr. Marcus: Mr. Thornton, isn't it a fact that the zebras and ponies work together?

Mr. Combs: I object to that as not proper recross examination. This has all been gone into.

The Court: Objection sustained.

Mr. Marcus: Very well. That is all.

Mr. Combs: That is all of this witness. I would like now to read the testimony of Philip LaBay, page 430, volume 4. [355]

PHILIP LA BAY,

called as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

(Questions read by Mr. Combs; answers read by Mr. Corkery):

"Direct Examination.

"Q—By Mr. Combs: Your name is Philip LaBay and you are also known in the circus as Blackie Wallace, is that correct?

"A—Correct.

"Q—Where do you reside, Mr. Wallace?

"A—At 366 Covina Boulevard, Baldwin Park, California.

"Q—Were you at any time employed by the Barnes Circus?

"A—Yes, sir.

"Q—During what period of time?

"A—1929 until 1934, and then in 1935 I was with the Tom Mix Circus; and from 1936 until 1938 I was with the Barnes show.

"Q—Until 1938, did you say?

"A—Yes, sir.

"Q—In what capacity were you employed?

"A—The first period on the Barnes show I was a teamster, driving six and eight-horse teams, and the last period I was a property man, a rigger.

"Q—Have you had any experience as a rigger? [356]

"A—Yes, sir.

"Q—How much?

"A—About four years.

(Deposition of Philip La Bay)

“Q—Were you present with the Barnes Circus at the time the accident which is the subject matter of this action took place?

“A—Yes, sir.

“Q—Do you know America Olvera?

“A—Yes, sir.

“Q—Do you know Karl Pollinger, her husband?

“A—Yes, sir.

“Q—Have you at any time had occasion to observe or look at the trapeze and trapeze equipment belonging to Miss Olvera here in the courtroom, marked Plaintiff’s Exhibit 4?

“A—Yes, sir.

“Q—I am now referring to the trunk. When was the first time you had occasion to observe that equipment?

“A—You mean in the courtroom?

“Q—No. I mean prior to that, when you were on the Barnes show.

“A—Oh, I helped Howard Mentz put it up the first day it come.

“Q—Did you help him thereafter?

“A—No.

“Q—When next did you see the equipment after that? [357]

“A—I saw it every day.

“Q—Every day. During the course of the Barnes show you saw it every day after America Olvera had put it up the first time, is that correct?

“A—Yes.

(Deposition of Philip La Bay)

“Q—Are you familiar with the details of that equipment, that is to say, the parts of it?

“A—Yes.

“Q—Have you examined that equipment here, being Plaintiff's Exhibit 4, in the courtroom?

“A—I have.

“Q—Can you state to the jury whether or not all of that equipment is here?

“A—No, it isn't.

“Q—Can you state to the jury that part which is not here?

“A—Yes, sir.

“Q—Will you state what parts are not, and describe them to the jury.

“A—There are twelve parts that are not on the rigging. There are four guy lines, four blocks that go on the end of the guy lines, four main falls that go on the center pole.

“Q—Four main poles and a center pole?

“A—That go on the center pole.

“Q—Are there any other parts missing?

“A—The pull-up rope, that is used to pull her up with; [358] a rubber hose that goes over the bar where she sits.

“Q—The bar on which she does her act?

“A—Yes, sir.

“Q—You knew Howard Mentz?

“A—Yes, sir.

(Deposition of Philip La Bay)

“Q—Was Howard Mentz present at the Barnes show on the day America Olvera had this fall?

“A—He was there that day, but not when the accident happened. He was there for supper.

“Q—He was there when?

“A—At suppertime.

“Q—Was he crippled or incapacitated?

“A—Yes, he had his foot in a sling, or in a cast.

“Q—In a cast. How long had he been in that condition, do you know?

“A—Well, in the cast about five weeks, but he had been hurt about six weeks.

“Q—His foot had been broken by an elephant tub, is that it, or injured?

“A—I don't know. Some object fell on his foot.

“Q—On the day this accident took place did you have occasion to do anything with America Olvera's equipment?

“A—Yes, sir.

“Q—What did you do; just tell the jury in your own words what you did.

“A—I put the main falls on the bail rings in the [359] morning when we went—

“Q—What are the bail rings?

“A—They are the big rings that go around the center pole where the canvas is hung. Everything goes on that bail ring.

“Q—Then what did you do?

“A—You mean in rotation?

(Deposition of Philip La Bay)

"Q—In rotation. Everything that was done with her equipment that day. State everything you did, and how.

"A—I did other things besides put up her rigging that day.

"Q—I mean, just in reference to her rigging that day.

"A—I hung her rigging and marked it and pulled it over to the side.

"Q—What part did you hang and mark?

"A—I marked the part that goes to the center pole and put it over by the main falls so it could be pulled back.

"Q—What are the main falls?

"A—The main falls are the part that go onto the rigging.

"Q—What do you mean by the rigging?

"A—The crane bar.

"Q—What else did you do that day and at what time, with relation to her equipment?

"A—That's all.

"Q—Did you have anything to do with the erection of the [360] trapeze itself?

"A—The trapeze was on the crane bar.

"Q—The trapeze was on the crane bar that day?

"A—Yes.

"Q—Did you have it swung over to the side there?

"A—Yes. It was swung over to the left side facing the grandstand.

(Deposition of Philip La Bay)

“Q—Just explain everything that was hung there and swung over to the side. Was the crane bar there?

“A—The crane bar and the trapeze—that is, the bar she works on—the pull-up rope and the four cables were on the rigging.

“Q—That was all done prior to the opening of the show, was it?

“A—Yes, sir.

“Q—What next was done to that equipment, if anything, by you?

“A—That was all.

“Q—When next did you observe the equipment?

“A—I watched it while they were putting it up.

“Q—Who put it up?

“A—Blackie Williams.

“Q—Anyone else?

“A—Yes. All the property men that worked in the center ring.

“Q—Did you see it as it was being put up? [361]

“A—Well, I was putting up a rigging in No. 3 ring, and I glanced down there and saw they were working on it.

“Q—Was that just prior to her act?

“A—That was while the zebra act was working.

“Q—Just explain to the jury what transpired, when that part of the erection of her equipment was going on.

“A—Just before the zebras came in, an act was swung over to the center, and one boy held the cables over to one side until the zebras got through working. As soon as the zebras got out, the guy lines were taken out to the

(Deposition of Philip La Bay)

blocks that were already fastened on the stakes, and the rigging was pulled to the front and then it was pulled to the back, and that brought it back tight.

"Q—By pulling do you mean pulling with the blocks and tackles on the guy lines?

"A—Yes.

"Q—Did you observe that equipment after it had been placed in place by pulling up on the second set of guy lines?

"A—Not from the center ring.

"Q—Did you see the equipment before Miss Olvera took her position on the bar?

"A—Yes.

"Q—State to the jury just what you saw and how you looked at it.

"A—I looked at it from ring No. 3.

"Q—What did you see there? [362]

"A—I saw the rigging was in its proper place in the center and all the guy lines were on, and apparently tight, and Mr. Pollinger went out and shook one guy line to see that it was tight, and then he went over back to the bandstand and waited for his wife to go in the ring.

"Q—You saw that yourself on that occasion?

"A—Yes.

"Q—Did you see a figure 8 hook on the upper right of the crane bar tangled up at that time?

"A—No; I did not.

"Q—Could you see at that time whether or not the figure 8 hook on the upper right of the crane bar was tangled?

"A—It could have been, yes, sir.

(Deposition of Philip La Bay)

“Q—Did you see the hook that attaches to the block that holes the upper right position of the crane bar on that occasion?

“A—Yes.

“Q—Did you see whether or not it was in place?

“A—It was.

“Q—It was in place?

“A—Yes.

“Q—It was not tangled up?

“A—The hook was not tangled up.

“Q—When was the next time you looked at that equipment?

“A—I helped take it down.

“Q—Did you see Miss Olvera take her place on the [363] trapeze when she performed her act?

“A—No. I was working on another act in No. 3 ring, and my attention was given to that act.

“Q—What first drew your attention again to the trapeze equipment of America Olvera?

“A—My act had finished and I had gone to the center ring to help lift Miss America down out of her trapeze.

“Q—Was that the customary procedure, to assist in helping her down out of her act?

“A—Yes; ever since Howard got hurt.

“Q—You say you assisted in that. Did anybody else help you?

“A—Mr. Pollinger, yes.

“Q—The two of you, is that true?

“A—Yes.

(Deposition of Philip La Bay)

"Q—How long had you remained there before Miss Olvera fell?

"A—I was still walking, going to her. I was by the No. 3 center pole when she fell.

"Q—Did you observe anything on that occasion that drew your attention to her fall?

"A—Yes; I heard somebody scream.

"Q—And what did you do then?

"A—I looked over to the ring and I saw her laying there, and I looked up at the rigging to see if it was broke.

"Q—What was the condition of the rigging when you [364] looked at it at that time?

"A—Well, the bar was swinging, and I seen there was nothing broke, so I went over into the center ring.

"Q—Did you notice whether the right side of the bar was four to six inches down lower than the left side?

"A—I was standing under the rigging. I couldn't tell from there.

"Q—You couldn't tell whether it was or not?

"A—No.

"Q—Did you assist in taking down the equipment?

"A—Immediately.

"Q—By immediately, how much time? A minute or less than a minute?

"A—Approximately a minute after she fell. The rigging had started to come down.

"Q—And you participated in taking it down?

"A—Yes, sir.

"Q—Did you observe Miss Olvera after she fell?

"A—I saw that her husband was carrying her out.

(Deposition of Philip La Bay)

“Q—How soon after she fell did you observe that?

“A—She no more than hit the ground until he started over there for her.

“Q—Was she being carried out before the rigging was taken down?

“A—Yes. She was on the way out before the rigging was taken down. [365]

“Q—Did you hear her say anything at that time?

“A—No. I was talking to the men, telling them what to do.

“Q—And you didn't hear her say anything at that time?

“A—No.

“Q—You saw Miss Olvera carried out by her husband all the way, is that it?

“A—Yes.

“Q—When was the next time you saw her?

“A—I never saw her again until she came back on the show that fall.

“Q—What was the condition of the rigging at the time you went up and took it down, or at the time you took it down?

“A—It was normal.

“Q—And by normal what do you mean?

“A—I mean there was nothing broke or nothing tangled up.

“Q—What was the condition of the trapeze bar at the time you took it down? Was it level or off true?

“A—I couldn't tell from my position in the ring.

(Deposition of Philip La Bay)

"Q—What was the condition of the hook and tackle attached to the crane bar at that time?

"A—They were in place. "

"Q—No further questions.

"Q—By Mr. Garrett: Prior to the time that the trapeze was hauled up, did you see Mr. Pollinger do anything else in the center ring besides what you have described here? [366]

"A—No, sir.

"Q—Will you state whether you have had any other experience in the circus business besides what you have told on Mr. Combs' direct examination?

"A—You mean from my first experience in the show business?

"Q—Yes.

"A—In 1922 I joined a small mud show, as a wire walker.

"Q—You were performing yourself?

"A—Yes, for about two years on that show.

"Q—Then where?

"A—With the M. L. Clark circus.

"Q—What did you do after that?

"A—I went to the Hagenback-Wallace Circus, and I stayed there until 1928, then I went to the Al G. Barnes Circus.

"Q—What did you do when you went with the Hagenback-Wallace Circus up until 1928?

"A—I was a teamster.

(Deposition of Philip La Bay)

"Q—What did you do with the Al G. Barnes Circus in 1928?

"A—I was a teamster.

"Q—Did you later become a property man?

"A—I went to the Tom Mix Circus as boss property man in 1935.

"Q—And after 1935?

"A—I came back to the Al G. Barnes Circus. [367]

"Q—What did you do at that time?

"A—Property man and rigger.

"Q—In 1936 what were you doing?

"A—I was on the Al G. Barnes Circus.

"Q—Doing what kind of work?

"A—Driving a team.

"Q—And in 1935, did I ask you about that?

"A—I was with the Tom Mix Circus, that year, as boss property man.

"Q—And in 1937 you went on the Barnes Circus again?

"A—Yes.

"Q—What duties did you perform then?

"A—I was property man until Howard Mentz got hurt, and then I took his place as head rigger.

"Q—Did you continue in that work until the 1937 season?

"A—Yes, sir.

"Q—With what circus?

"A—With the Al G. Barnes Circus up until 1938.

"Q—And have you been with them since?

"A—No.

"Q—You have not been employed by the Al G. Barnes Circus since 1938; is that correct?

"A—That is right.

(Deposition of Philip La Bay)

"Cross Examination

(Questions read by Mr. Marcus; answers read by Mr. Corkery): [368]

"Q—These main lines connect outside of the ring, don't they?

"A—Yes.

"Q—And the line that Mr. Pollinger helped Mrs. Pollinger up with is attached to this line outside of the ring, is it not?

"A—It was attached to the clevis at the end of the crane bar.

"Q—I mean when he got hold of it, the end of it came down on that line, didn't it?

"A—Oh, yes, but it comes below the crane.

"Q—That is right. And when he went to take hold of her to lift her up over that line, he would have to take it off of that line, wouldn't he?

"A—I don't understand.

"Q—The main line that came down.

"A—No; he did not take it off.

"Q—Well, it was on that?

"A—It is on there permanently.

"Q—And he would have to take it off of that, or at least take off whatever line was on there, to get over to the apparatus to lift her up?

"A—I don't know what you mean by taking it off.

"Q—Maybe I don't explain it right. These lines that came down off of the top of the apparatus were outside of the ring, those four lines? [369]

"A—The ends of them come down outside of the ring.

(Deposition of Philip La Bay)

“Q—On one of those lines was there an extra rope by which Mr. Pollinger helped Mrs. Pollinger up on the apparatus?

“A—No; it was not on the line.

“Q—Where was it, then?

“A—It was on the clevis at the end of the crane bar.

“Q—The clevis at the end of the crane bar was on top, wasn't it?

“A—Yes.

“Q—What part of it came down? Was there a rope that came down?

“A—Yes.

“Q—Where was that fastened when it came down to the ground?

“A—It was held over to one side by the property man until Mr. Pollinger wanted it.

“Q—Was that one close to the line that was supporting the apparatus?

“A—I don't just remember.

“Q—Well, is not that the line that he took hold of at the time he shook the rigging?

“A—No. That line is slack all the time.

“Q—Well, is not that the line that was supporting the rigging that he took hold of and shook?

“A—Yes.

“Q—That is the one I mean. [370]

“A—Yes.

“Q—And that was outside of the ring?

“A—Yes.

(Deposition of Philip La Bay)

“Q—He never went inside the ring, though, did he?

“A—Well, he could have.

“Q—But he did not, though, did he?

“A—I was in ring No. 3 and I didn’t see exactly what he did.

“Q—That is all.

“Redirect Examination.

(Questions read by Mr. Combs; answers read by Mr. Corkery):

“Q—Who paid your salary during the year 1937?

“A—The Al G. Barnes-Sells Floto Circus.

“Q—Where did you collect it?

“A—Sometimes at the ticket wagon and sometimes in the coaches.

“Q—Did you ever get transmittals of money from Ringling Bros. during that period of time?

“A—I never did.”

Mr. Combs: I will call Mr. Cronin. [371]

SYLVESTER CRONIN,

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

A. Sylvester Cronin.

Direct Examination.

Q. By Mr. Combs: What is your address, Mr. Cronin?

A. 2619 Oak Knoll, San Marino.

Q. What is your present occupation?

A. Showman.

Q. Were you ever employed by the Barnes Circus?

A. Yes, sir.

Q. During what period of time?

A. Well, I was manager of the Barnes show from '28 or '29 to the close of '37.

Q. Do you know Mr. Thornton? A. Yes.

Q. Was he employed by the Barnes show at that time?

A. Yes.

Q. In what capacity?

A. Equestrian director. He had charge of the performance.

Q. Who paid his salary?

A. The Al G. Barnes Circus.

Q. Who paid Miss Olvera's salary during the time she was with the Barnes show? [372]

A. The Al G. Barnes Circus.

Q. How long have you been in the show business?

A. Most all of my life.

(Testimony of Sylvester Cronin)

Q. Prior to 1927, when you entered the Al G. Barnes Circus as manager, what had you been doing?

A. I was with the American Circus Corporation for 19 years.

Q. 19 years prior to that time? A. Yes.

Q. In what capacity had you been?

A. Assistant manager and manager.

The Court: Will you talk louder?

A. Advertising manager and ticket seller and several different positions there.

Q. By Mr. Combs: Prior to that time you were in the circus business? A. A few years.

Q. For several other circuses?

A. You might say from about 1908 on.

Q. At the time of this accident involving Miss Olvera were you present in the big tent? A. Yes.

Q. Going back to the time when she was first employed, did you have a conversation with her then?

Mr. Marcus: Just a minute. I object to that as calling for a conclusion of the witness, when she was [373] employed.

Mr. Combs: I will withdraw the question and re-frame it.

Q. At the time Miss Olvera first came to the Barnes show did you have a conversation with her?

A. How do you mean?

Q. When did Miss Olvera first come to the Barnes show?

A. She came with us at the show in San Diego. That was the opening of our season.

(Testimony of Sylvester Cronin)

Q. Was that March, 1937? A. Yes, sir.

Q. Did you have any conversation with her at that time?

A. Well, I think she didn't get there the first day, rather. When she got there she was late.

Q. Just whether or not you had a conversation when she arrived.

A. She introduced herself, her and her husband introduced themselves to me and said that they were ready to go to work.

Q. Was that all that was said at that time and place?

A. I don't remember exactly the conversation, except that we—

Q. Referring to the date of the accident.

The Court: Let me ask you, Mr. Cronin, how long is the average show season?

A. If the season is good it runs from 28 to 30 weeks.

The Court: It usually starts in March? [374]

A. In this country, usually the middle of March.

The Court: Go ahead.

Q. By Mr. Combs: Where were you when this accident took place?

A. When the accident took place I was sitting in the reserved seats.

Q. With whom? A. Mr. Valdo.

Q. Was anyone else there?

A. That day we had some visitors from the Ringling show.

(Testimony of Sylvester Cronin)

Q. Did you have occasion at that time to observe Miss Olvera in her act?

A. While the act was going on, yes, sir, I noticed the act.

Q. You noticed the act?

A. I was in and out of the show. Mr. Valdo was there. I was sitting in the seats with him part of the time; I was in and out; and I came back just as I think she was up in her rigging; if I am not mistaken the act was just starting.

Q. Was there any thing unusual that you observed with respect to her performance on that occasion?

Mr. Marcus: I object to that as calling for his conclusion.

Q. By Mr. Combs: I will withdraw the question. Did she suffer any accident at that time?

A. Yes, sir. [375]

Q. Just relate exactly what you observed in connection with her performance of her act up to the time she fell.

A. Well, she swings her act. She was on her feet and was swinging in her act, and then she went on her knees; I think it was the handkerchief act. She picked the handkerchief up with her teeth while she was swinging, and she fell out of the rigging; fell forward.

Q. Just explain how she fell out.

A. Well, she was on her knees, and as the bar went forward she pitched out.

Q. From the front of the trapeze?

A. From the front of the trapeze.

(Testimony of Sylvester Cronin)

Q. How far were you from that point on a straight line to where she pitched out of the trapeze?

A. I would say about 40 or 45 feet; 45 feet; something like that.

Q. That is, I mean on a straight line from that point.

A. Her rigging was in the middle of the ring. The ring is 42 feet long, so it would be a little over 20 feet to the end of the ring, the ring curb, straight out. I was sitting on the first row, I think.

Q. What happened to her as she fell? Did she fall in the net, or otherwise?

A. She just missed the net.

Q. By how much?

A. It is kind of hard to remember, but I would say a [376] foot and a half or two feet.

Q. What did you do immediately then?

A. Well, I sat there. Of course, naturally I looked up at the rigging, and then her husband picked her up, and carried her out. I got up and walked around the end seat. I did not want to go across the ring, naturally. I went around the end, and went back to the doctor's tent. We have a tent behind where the doctor stays—to see if she was hurt, and how bad.

Q. Did you observe what the condition of the trapeze was when you looked at it, right after her fall?

A. It looked all right to me.

Mr. Marcus: I move that that be stricken as calling for a conclusion.

Q. By Mr. Combs: What do you mean by "all right"?

The Court: It may go out. Just answer that question Mr. Dewing.

(Question read by the reporter.)

The Court: It may go out. Just answer the question yes or no, Mr. Cronin. A. Yes.

Q. By Mr. Combs: Relate what the condition of it was. A. It looked all right.

Q. Was the trapeze bar level, or otherwise?

A. It looked level to me.

Q. Did you see any hooks, figure 8 hooks, or other hooks [377] in a disordered condition?

A. No, sir.

Q. Was it stationary or swinging at that time?

A. It was swinging a little, naturally. She just flew off of it.

Q. Did you hear any snap or noise at the time she fell? A. No, sir.

Q. Was the band playing at that time, or not?

A. I don't think the band was. That was the finish, toward the finish of her act, and at that time it usually stops.

Q. Did you observe the righthand side of the bar hanging about six inches lower than the lefthand side of the bar at that time when you looked at the trapeze?

A. No, sir.

Q. Did you have any conversation with Miss Olvera when you talked to her in the doctor's tent?

A. She wasn't in the doctor's tent.

Q. Where was she?

A. Let me refresh my memory on that. If I am not mistaken, I went back to the doctor's tent, and they had

(Testimony of Sylvester Cronin)

carried her over to the side, I think on a stretcher, and I went around toward the front to see if they had ordered an ambulance, and the boy had already ordered the ambulance, and I went back. When I came back, we were shown inside of the race track, and she was there, I think on a cot. I am [378] not positive, but I think she was waiting there for the ambulance to come to take her.

Q. Did you have any conversation with her at that time? A. No, sir.

Q. Was she conscious or unconscious then?

A. Conscious.

Q. Did you go to the hospital later to see her?

A. I went in the evening. Mr. Valdo went afterward, and a couple of people there visiting from the Ringling show, and I went up with the doctor.

Q. Did you have any conversation with her at the time you saw her in the hospital?

A. I did not see her. The nurse said she was resting and not to disturb her. We stayed there quite a little while, and her husband came out, and we went to see him. He came out.

Q. Did you hear anything said by Miss Olvera while she was lying on the ground, subsequent to her fall?

A. No, sir. Of course, I was sitting in the seat there at that time; that was when the fall happened.

Q. Do you know how long the circus tent, or the so-called big top, was on the day of the accident at Anthony, Kansas? A. How long?

Q. Yes. A. 310 feet long. [379]

(Testimony of Sylvester Cronin)

Q. Were the star back seats up on both ends of the tent on that day, if you remember?

A. If I remember right they were only up at one end. Sometimes we did not put all the seats up. I used to gauge about how the business was going to be. If it looked like it wasn't going to have such a good business, we left some of the seats down.

Q. How far was the entrance from the menagerie tent to the center ring, approximately?

A. I would say roughly 150 to 155 feet.

Q. Do you know who Philip La Bay is?

A. Yes, sir.

Q. Who is he?

A. Well, he was a rigger. We used to call him, if I am not mistaken—I knew him by the name of Ringling.

Q. Wasn't his name Blackie Wallace, his circus name?

A. I don't think so.

The Court: Will you read the answer, Mr. Dewing?

(Answer read by the reporter.)

Mr. Combs: That is all.

Cross-Examination.

Q. By Mr. Marcus: At least you witnessed part of the performance, did you, Mr. Cronin?

A. I would say part of it, yes, sir.

Q. Did you see part of Miss Olvera's performance?

A. Yes, sir. [380]

Q. Did you see all of it?

A. No, sir.

(Testimony of Sylvester Cronin)

Q. Tell me what part you did see.

A. If I am not mistaken, she was going up with her act; she was just up, when I came in.

Q. All right, tell me what part you didn't see.

A. I don't remember all her routine. I mean, the starting, where she was first put up in the ring.

The Court: You saw that?

A. No; I mean, when she went up to do the act, I didn't see her go up.

Q. By Mr. Marcus: That is not part of her act, climbing up there, is it? A. No.

Q. Tell me what part of the act you didn't see.

A. The finish of it, I would say. Maybe the first part.

Q. The first number of her act. The finish you didn't see?

A. That is, where her act would have been; I seen the finish of it, where she didn't go to finish her act, in other words.

Q. I want to know the part that you didn't see that day.

Mr. Combs: I think it has already been asked and answered.

The Court: I think it either has been answered, or it is a little uncertain.

Q. By Mr. Marcus: Did you see all of her routine from the [381] time she climbed up into the trapeze, until she fell out?

A. I would say I did, from the time she got up to the trapeze.

(Testimony of Sylvester Cronin)

Q. During all that time did you observe her act?

A. Not all the time.

Q. You were sitting and talking to Mr. Pat Valdo, were you not? A. Yes, sir.

Q. At the time she fell, did you know that was the end of her act, or not?

The Court: Well, Mr. Marcus, what do you mean by her act?

Mr. Marcus: Had she completed her routine at the time she fell?

The Court: Do you mean based on what his knowledge was of the act previously?

Mr. Marcus: That's right. I am assuming that he knew her act, your Honor. He so testified on direct examination, I believe.

The Court: Do you understand the question? If you do, you may answer.

A. To know her complete routine, I couldn't say that I know whether she put all her routine in or not that day, but as long as the act was on, I seen the finish of it.

Q. By Mr. Marcus: Do you know whether or not at the time she fell it was at the conclusion of her entire routine?

A. She did not finish it, because the finish of it was [382]to pick up the handkerchief in her mouth.

Q. And she had not done that yet, to your knowledge?

A. No; she was just getting ready to do it. She was swinging for that, if I am not mistaken. That was the finish of her act.

Q. She was just swinging for the finish then?

A. When she flew out.

(Testimony of Sylvester Cronin)

Q. Can you tell me whether or not you remember at that time what her entire routine was?

Mr. Combs: I think that has already been asked and answered. He said he did not know; that he could not say.

The Court: You may answer it.

A. Roughly, yes.

Q. By Mr. Marcus: How long did it take, approximately?

A. I would say her act ran from four to five minutes.

Q. Do you know how long her act had gone at the time she fell?

A. I couldn't say positively. I would say roughly, three minutes or three minutes and a half.

Q. That act was not completed at the time she fell?

A. No, sir.

Q. During the entire time, Mr. Cronin, was there, or did you see a net underneath her trapeze?

A. Yes, sir.

Q. Who was that net being held by?

A. The property men; probably eight or ten property men [383] were holding it.

Q. By whom were they employed?

A. By the circus.

Q. Who paid their salary? A. The circus.

Q. The Barnes Circus?

A. The Al G. Barnes Circus.

Q. What was the purpose of that net?

A. It was held underneath there, in case anybody would fall, to catch them.

(Whereupon an adjournment was taken until 10:00 o'clock a. m. the following day, Friday, January 7, 1944.)

[384]

Los Angeles, California, Friday, January 7, 1944;
10:00 a. m.

(Stipulated that the jurors were all present and in their seats).

Mr. Combs: If your Honor please, we have here a doctor who examined the plaintiff last night, and we would like to offer his evidence at this time, if we may be permitted to suspend with Mr. Cronin's testimony.

The Court: I have no objection.

Mr. Marcus: I have none whatsoever.

HUGO M. KERSTEN,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Hugo M. Kersten.

Direct Examination

Q. By Mr. Combs: What is your occupation?

A. Physician and surgeon.

Q. Doctor, how long have you been engaged in your profession? A. 25 years.

Q. Where? A. In Los Angeles.

Q. Will you relate some of your early training and experience? [385]

A. I graduated from the medical, Chicago Northwestern, and received a diploma in medicine from the University of Southern California; I had an internship in Providence, Rhode Island; an internship in the City of Los Angeles, and then started practicing in Los Angeles.

Q. Have you practiced here ever since?

A. I have practiced here ever since.

(Testimony of Hugo M. Kersten)

Q. What is the nature of your practice?

A. General practice and surgery.

Q. What connection have you with medical associations, or what positions do you hold?

A. I am a member of the Fellows of American College of Surgery; State Board of Medical Examiners of the State of California, American Medical Association, member of the State and County Associations; different staffs in the hospitals; president of the Presbyterian Hospital, Hollywood Memorial, in this city, and others.

Q. During the course of your practice, have you ever had occasion to treat spinal injuries? A. Yes, sir.

Q. Frequently or otherwise?

A. Frequently, for my type of work.

Q. You have treated several cases of fracture of the vertebrae or spine? A. Yes, sir.

Q. Doctor, have you made an examination of America [386] Olvera? A. Yes, sir.

Q. When did that take place?

A. Late yesterday afternoon or evening.

Q. What did you do in connection with that examination? First, did you take from her a statement or case history? A. Yes, sir.

Q. Thereafter, what did you do?

A. Following that, I examined her.

Q. Will you please relate to the jury the best you can, refreshing your memory from any notes you have, if you made them, what you secured by way of information from Miss Olvera, as a case history?

A. I examined Miss Olvera yesterday afternoon, at which time she told me she was married; 35 years of age.

(Testimony of Hugo M. Kersten)

Q. How old?

A. 35 years. I asked her what her main difficulty was. She gave me a list, which I wrote down, in her own words, and they were as follows:

"1. Constant pain in the back from the mid back down along the spine, because of sitting in court the past three days;

"2. Irregular menstruation; some months she flows 30 minutes, only a small amount. Periods run from 40 to 60 days apart. The longest one was for one-half day, and most always they were with pain; [387]

3. The right leg, she said had no feeling in part of it;

4. The left shoulder was lower than the right shoulder;

5. The right leg, she said, was shorter than the left leg;

6. Limitation of action of the right foot. She could not extend it down to the floor;

7. Eyesight is changed since her accident. Now she has to wear glasses for reading;

8. Left arm hurts in bad weather since her accident, and she said that all of the above conditions are present, and have been present since the accident which occurred on September 12, 1937, in Anthony, Kansas, while performing for the circus, at which time she fell approximately 22 feet to the ground.

She was treated then at Anthony, Kansas, by a doctor who placed her in the hospital, took X-rays, and kept her in bed. She was treated symptomatically at this place, and at the end of five days she joined her husband, at her own insistence, to follow the circus, going by train from Anthony, Kansas, to Amarillo, Texas, and at that time

(Testimony of Hugo M. Kersten)

she was placed in bed, in an auto court, and cared for by her husband. From that time on she traveled with the circus, under her husband's care, until they reached Baldwin Park, California. And I do not recall that date, nor do I have it down. I believe it was in November, of the same year. [388]

After arriving at Baldwin Park, California, she sought the help of an osteopathic woman doctor in Hollywood, who cared for her on several occasions, after which she made a change to another woman osteopathic doctor, who cared for her off and on for the following three years. The first thing which this latter woman doctor requested were X-rays, which were taken at the Wilshire Hospital, in this city. At that time the doctor treated her by means of lights and massage, compresses, hypodermic injections, and vitamins. Also gave her uterine treatments, and pelvic treatments.

The husband about that time made a brace for his wife, which up to that time was apparently the only brace which they had made, with the exception of an improvised brace which they described as made by the doctor, consisting of three boards which she found to give her considerable comfort, when she was lying down, particularly at night. These three boards hooked over the top, to keep her in a cradle-like fashion, and when in that position, and with that protecting covering of the board, she was always comfortable. The woman doctor did not order this brace, but the husband made it, improvised it himself. No other doctor has cared for this lady since that time.

She said that she had had all of the childhood diseases, including malaria, and had been operated on for appendicitis 18 years previously. She was pregnant at one time,

(Testimony of Hugo M. Kersten)

and had a miscarriage at three months. She stated further she [389] now sleeps on a hard bed, of her own choice, but she refused to go to the General Hospital, or any other place where she might obtain some relief.

Q. Will you proceed, Doctor, and inform us of the nature and extent of your physical examination?

A. The physical examination revealed a female 5 feet 3 inches tall, weighing 142 pounds; hemoglobin 60%; blood pressure 108 over 70; pulse rate 78. Her eyes reacted normally to light and accommodation; the ears were normal; sinuses were clear. There were several dead teeth in her mouth, and quite a few of them had been filled, obviously needing dental help. The throat was clear; the neck was negative, and no glands were palpable in the neck. The breasts were well developed, containing no glands. The chest was clear throughout. The head was regular in size, shape and function. The abdomen was pendulous, flabby, fat.

There was a scar over McBurney's point, in the lower right abdomen, and the entire lower part of the abdomen was tender to pressure. The vaginal examination showed a marital outlet. The cervix was lacerated. The uterus was retroflexed, 3 degrees to the right; the tubes and right ovary were enmeshed, tender; the right extremity was 32 inches long, well developed; no tenderness. The circumference above the mid-knee was 19¼ centimeters, below the knee, at the mid-calf was 14 centimeters. There was an area of lessened sensation in the right leg over the [390] anterior and lateral portion of the leg, from the middle foreleg to the lower one-third of the same leg. The left leg was 32.8 inches long; was 19¼ centimeters above the knee in circumference, the mid portion, and

(Testimony of Hugo M. Kersten)

13 $\frac{7}{8}$ circumference in the mid portion of the calf. She was unable to extend the foot, or to flex the same to any appreciable degree.

The reflexes on both sides were equal. The back showed a slight deviation of the mid-dorsal region of the spine; the area approximating the twelfth dorsal, and first and second lumbar vertebrae, slightly to the left, with muscular spasms on both sides, more so on the right side. No muscular atrophy on either side. She complained of pain on motion of the back. The muscular coordination of the right leg was diminished somewhat. A blood Wassermann was taken, but time did not permit to have any check-up of the X-rays taken of the back at that time.

Q. Now, Doctor, in the light of your examination of this woman, have you come to a conclusion respecting her condition?

A. With the help of the X-rays, which I have partly examined this morning. I have not concluded the examination of those X-rays.

Q. You have commenced to examine the X-rays, but have not concluded your examination?

A. That is correct. [391]

Q. Can you do so on the stand? A. Yes, sir.

Q. May we have that shadow box for these X-rays?

A. This film was taken 5-13-38, and shows a fracture of the twelfth dorsal vertebra, and the first and second lumbar; compression fracture. By compression fracture we mean a fracture which has been occasioned or caused by a sudden impact of some kind. It compresses the spinous processes together. This picture was taken 10-11-38—October, 1938, the same year, and shows the

(Testimony of Hugo M. Kersten)

same vertebrae that had been previously shown, but there is quite an improvement in the filling out of the vertebrae. Take this one, for instance—

Q. Which one are you referring to, Doctor?

A. The first lumbar. I am pointing to the vertebrae, a sort of a disk-like effect in here, cone-shaped. This has filled out, which shows a process of healing. The second lumbar also shows a process of healing by being filled out from this portion to here. The twelfth dorsal still shows compression in the upper portion.

These are the lateral views of this back, and they show the condition much more vividly than do the anterior-posterior views. The anterior-posterior views, taken on the same date, that is, October 11, 1938, looking to the back, and straight through the spine anteriorly from the front to back, show that the anterior condition of these vertebrae are in pretty fair shape, with the exception of the twelfth dorsal, [392] which is not filled out. The spinous processes on both sides are intact. The X-ray, otherwise, is within quite normal proportions.

Q. Have you completed your examination of these X-rays, Doctor? A. Yes, sir.

Q. I take it you have no more recent X-rays to examine than those indicated here?

A. I do not have any more recent X-rays.

Q. As a result of your examination of these X-rays, and of your personal physical examination of Miss Olvera, and her statement of the history of her case, have you come to a conclusion respecting her physical condition at the present time? A. Yes, sir.

(Testimony of Hugo M. Kersten)

Q. Will you relate to the jury in your own words what that conclusion is, Doctor?

A. I think that this patient has a severe physical and mental strain and pain. She has had an injury to her back which has improved, probably not completely. Had that injury been treated according to the recognized way of treatment, I think she would be in better shape today than she is. She at the present time is suffering mentally and physically probably from a glandular dyscrasia. By that I mean a derangement of the glandular system, and particularly the thyroid and the function of the ovaries. I think that [393] accounts for her irregular menstruation.

I think she is potentially what is called a hypothyroid. By that I mean a decreased secretion of the thyroid gland, which is the activator of all other glands in the system. That condition can come on any time, whether they have had an accident or not.

The function of the right ovary is very much impaired, because of her condition in the pelvis. However, she has the left ovary in good condition. She has some teeth which are dead, and can cause an absorptive condition in her system. She has a back which shows muscular spasm, and by that I mean nature's own assistance to protect and guard an area which the patient is conscious of, whether it is a mental consciousness over a long period of time, or whether it is due to active pathology; and she has had an active pathology in this place, and that of course, is a question. She could overcome that muscular spasm, and discomfort, in the back, even at the present time by wearing a proper support, which she is not doing. She is wearing a support but not a proper support for complete relief.

(Testimony of Hugo M. Kersten)

She had an area over the skin of the right leg, which shows a lack of appreciation of pain sensation, by pricks with a pin, which is due to a superficial nerve disturbance. That probably is caused by—

The Court: Doctor, -was that a complete anesthesia over that area? [394]

A. For a small portion, there is a superficial anesthesia, that could be occasioned by a nerve involved, which could be toxic in origin, or pressure—pressure emanating from the sinus processes. The lack of coordination in the right leg, affecting the foot and toes directly, is a lack of muscular coordination, which is, based, of course, on nerve enervations, which can also be due to pressure on the nerve, and due to an old trauma, too.

Q. By Mr. Combs: Doctor, what in your opinion should be the treatment in this situation?

A. This patient should at this late time have proper treatment. By proper treatment, I mean, first of all, a thorough and complete study of her general physical condition; a study of the glandular system; and the removing of any foci of teeth or infected tubes. She should have, as a result of this trauma to her back, another complete and careful physical X-ray study. She should have possible surgical relief by means of a bone grafting operation on that spine. I am making that statement with apologies, because I would much prefer making the statement after examining the recent X-rays, but that would be my impression from my study of the case and these X-rays, which I have had the advantage of seeing.

The Court: What do you think would be the result of such treatment?

(Testimony of Hugo M. Kersten)

A. Judging from the cases I have seen in the past, it [395] would have very good results.

Q. Over how long a period of time do you think it would take, for doing all the things you suggest, including the surgery?

A. I would at least allow a year to a year and a half.

Q. What do you think would be the cost of the same?

A. The cost is hard to state. She would have to be in the hospital, and have to be on her back in the hospital on a hyperextended frame; that can be a frame or plaster cast, for a period of eight weeks, and possibly two more weeks—possibly ten weeks, and she would thereafter have to wear a properly fitted and constructed brace. She should have a brace which will put support under her armpits, and such as to lift the spinal column off of itself. She would have to wear a type of brace which consisted of a light weight steel up and down the back, and two steel bars in front.

Q. That should be made by an expert of long experience?

A. It would be made by a bracemaker. I have one on myself, which I wear for a broken back. That cost me \$47.90. She should have physiotherapy treatments, and massage treatments following that, and during a period for probably a month, following the removal from the cast, if she is in a cast. She should have massage and physiotherapy to her right leg. I think with that, and with other proper constructive treatments,—I mean general constructive treatments, in the case of her general health, I think we can [396] assume she could regain a fairly active state in life.

(Testimony of Hugo M. Kersten)

Q. Do you include in that the surgery which you have referred to, and bone grafting?

A. That would come after. That would come directly after the hyperextension and the cast which follows the surgery. I don't mean by a fairly active life, to follow the trapeze business. She would be a useful citizen.

Q. By doing the normal tasks about the house, and in daily life? A. I think so.

Q. Would she be able to follow such employment?

A. Yes.

Q. By Mr. Combs: Except she could not be employed in the work of the trapeze performer?

A. No, not things of that type.

Q. Does a hypothyroid condition she possesses, in your opinion, result from this injury? A. No.

Q. Are the infected tubes and ovary in the vaginal region due to this accident?

A. Not the infected tubes, on the right side only. I know that has no connection with the accident.

Q. I take it, you did not observe anything abnormal in the pelvis? A. Not in the pelvis.

Q. Other than what you stated? [397]

A. In the pelvis. She has a retroverted uterus; a third degree retroversion.

Q. This illness you have referred to, is that due to this accident? A. No.

Mr. Marcus: The third degree—did you mention something about a third degree?

A. Yes, a third degree retroversion. It is falling of the uterus, which can come from relaxed ligaments; it can come from heavy work; it can come from a fall. If so,

(Testimony of Hugo M. Kersten)

it is easily replaced, and stays back in place. A retroverted uterus of this type usually occurs in an individual who has relaxed ligaments, and poor bodily muscular tone in certain portions of her body. That usually happens in glandular dyscrasia, due to the weight of something dragging it down.

Q. Can that condition be corrected?

A. Surgically, yes, sir.

Q. You stated that she complained of one leg being shorter than the other. Did you measure the leg?

A. Yes. It was one-eighth of an inch shorter.

Q. Which one? A. The right leg.

Q. The course of the treatment that will be indicated—you have indicated the treatment you would give now?

A. Yes.

Q. Doctor, if this patient had been brought to you [398] immediately after the fall which she had at Anthony, Kansas, would you relate to the jury what course of treatment you would have given her at that time and place?

A. I will speak of a similar case. If I had had a case of that nature, which had a fall of that type, I would, first of all, have attempted to make a complete diagnosis, and use every means at my command to effect such purpose. Certainly I would have gotten X-rays, and if the X-rays had shown that the individual had this misfortune; and she had a fracture of the twelfth dorsal, and the first and second lumbar vertebrae, I would have placed her in a hyperextension cast, and put her on her back, with the back of the head down, and the feet down. That could be done by using a brace, or by putting her in a plaster cast. If there were a great deal of compression in the

(Testimony of Hugo M. Kersten)

fracture, I would have put an extension on, so as to help nature hold the two portions of the spine apart. If the conditions at that time had appeared from the X-rays that an extension would not have been indicated, then lying on the back would have been sufficient treatment. I would have kept that portion of the body hyperextended for at least two months. I would have checked during that time by X-rays, as to her progress; I would have checked at that time by means of posterior-anterior and lateral X-rays of the spine, and if a sufficient improvement had ensued, and the vertebrae had shown as much improvement as we usually expect, then I would have taken her [399] out of the cast, and out of the hyperextension, and put her in a supportive style brace, which would relieve the pressure on the spine by virtue of the fact that she was encased in a steel brace, and was given support under the arms. In treating the spine and pelvis we ordinarily would expect that amount of progress. In some people, due to extraneous reasons, or causes, such as lack of proper chemistry in their body, lack of sufficient and proper vitamins, lack of certain glandular secretions, such as the thyroid, these people are slower in recuperating, and slower in healing. That is true of the soft tissue, as well as the bony tissue.

Therefore, the period of treatment in such case would, and could be longer. Some patients, if they had outside extraneous causes, might possibly have to stay in the cast twice as long as the normal healthy individual. Following that the patient would get up and wear the brace. I would, by the way, have had her stay on a hard bed for at least three or four months following that; any hard bed, one that was made of boards across the springs and

(Testimony of Hugo M. Kersten)

mattress. She should have massage treatments to her back and forehead, and even heat treatments, and then if the patient feels below par, for any of the conditions referred to a few minutes before, I would continue to build up her health generally.

Q. Given that course of treatment is there recovery from this type of fracture? [400]

A. From this type of fracture there is ordinarily complete recovery.

Q. You have observed complete recovery from that course of treatment, within your own personal experience, have you not?

A. I have, many of them.

The Court: In what sense do you use the term "complete recovery?"

A. Complete physical recovery; complete recovery of the fractured bone, and the functioning power thereof in connection therewith.

The Court: Entire recovery of function?

A. Yes.

Q. By Mr. Combs: The course of treatment followed by Miss Olvera, to-wit, being moved from the hospital within a week after the accident, and then treated in the manner indicated by the history, would that have any effect on the speed of her recovery?

A. I would say that was not the best treatment.

Q. Would you say it was good or bad treatment?

A. I would say it was not the recognized treatment among the medical profession in this locality.

Mr. Combs: That is all. You may cross examine.

Mr. Marcus: Thank you Doctor. There will be no cross examination. [401]

SYLVESTER CRONIN, recalled

Cross-Examination, resumed

Q. By Mr. Marcus: Mr. Cronin, do you know how Miss Olvera came to the Barnes show?

A. Only in a rough way.

Q. You did not employ her, did you?

A. No, sir.

Q. Do you know who did?

A. Mr. Gumpertz; I understand he signed her contract.

Q. Who is Mr. Gumpertz?

A. General manager of Ringling-Barnum & Bailey Show; also the other show, the Barnes show.

Q. He was general manager of the Ringling show and Barnes show? A. Overseeing the Barnes show.

Q. You managed the Barnes show? A. Yes.

Q. He was your superior? A. Yes.

Q. Would you recognize his signature if you would see it? A. I haven't seen it for seven years or so.

Q. By the way, Mr. Gumpertz sent you her contract, didn't he? A. I think he did.

Q. Look at the signature on the back of it, and tell me if that isn't the same Mr. Gumpertz you have referred to as [402] being your superior, and the general manager of your show and of the Ringling show.

A. I would say it is. It looks like it.

Q. Do you remember whether or not this is the contract that was sent you by Mr. Gumpertz?

A. No, sir, I don't.

Q. You were sent a contract, however, were you not?

A. Yes, sir.

(Testimony of Sylvester Cronin)

Q. She continued to work with the Barnes show, did she, on that itinerary, under this Ringling contract?

A. Yes.

Q. And you paid her the same salary?

A. Yes, sir.

Q. You had how many riggers, Mr. Cronin?

A. I don't remember the exact number at that time.

Q. Can you give us some estimate.

A. They usually ran from six to eight.

Q. Do you remember having a Howard Mentz at that time in your employ? A. Yes, sir.

Q. Was he a rigger? A. He was a rigger, yes.

Q. Was he what you call the boss rigger?

A. I think he was. Pardon me; not that day. He had had an accident, and he was not working at that time.

Q. And he was not there when the rigging went up either, [403] was he?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not within the knowledge of this man.

Mr. Marcus: If he knows.

The Court: Overruled. You may answer.

A. Give me the question again.

The Court: Read the question.

(Question read by the reporter.)

A. I don't know.

Q. By Mr. Marcus: Was Howard Mentz, prior to the date of the accident, the boss rigger?

A. Yes, sir.

(Testimony of Sylvester Cronin)

Q. How many prop men did you have?

A. I don't remember the exact amount. It varied. Sometimes there would be a few drop, off and on; I don't remember who had charge of this department. I only consulted them in case there was something special.

Q. You were over all of these different bosses, weren't you?

A. Yes, sir.

Q. Do you remember who the prop man boss was?

A. I think it was Blackie Williams.

Q. Is he in court now?

A. No, sir.

Q. Tell us what the duties of the riggers were, to your knowledge, Mr. Cronin. [404]

A. They were to put the props up for the different acts, that is, the aerial stuff.

Q. Tell me, if you know, when the props for America's act went up.

A. I don't know the exact time. It all depends on how the work was; how busy they were; whether we were; in town on time. If we were a little late, naturally it varied.

Q. It varied as to the time it went up?

A. It was ready for the doors to be open.

Q. In other words, it all depended, did it, as to when you came into town, and when you unloaded the trains?

A. As fast as the tents was up, they got the props.

Q. In other words, the props went up when the tents went up?

A. Not all of them.

Q. Which ones went up?

A. I don't remember the exact ones. I wasn't in there enough to see them.

(Testimony of Sylvester Cronin)

Q. Confine yourself to Miss America's rigging. Do you know that the rings and blocks went up when the main tent went up?

The Court: Will you read the question, please?

(Question read by the reporter.)

A. After the tents are up the riggers usually put their falls up; then they fasten the apparatus and things later on.

Q. By Mr. Marcus: Do you know, Mr. Cronin, whether or not [405] Miss Olvera's trapeze went up before the show started?

A. Well, it would have to go up before the show started; that is, before her act, rather.

Q. I mean before the circus show started.

A. Whether her trapeze was up before the show started?

Q. That's right.

A. I don't know. They never did put them up that early. There was the falls; they were fastened, and the riggers fastened their props onto the falls. As a rule, they were put up usually before the act.

Q. Do you mean the apparatus, the trapeze itself?

A. I was never in there all the time. I couldn't tell positively just what time they was put up.

Q. You have seen the performance many times, I presume, before the accident?

A. Yes, sir.

Q. Did you see it from the beginning?

A. At that day?

Q. No, prior to that day.

A. Do you mean did I see the whole show through?

(Testimony of Sylvester Cronin)

Q. That's right.

A. I don't know if I even seen the whole performance through.

Q. By the Court: You are referring to Miss Olvera's act only?

Mr. Marcus: No, your Honor. [406]

The Court: Do you mean the entire show?

Mr. Marcus: That's right.

The Witness: May I explain?

The Court: Yes, you may.

A. Being manager of the show I was on the go from the front to the back all the time. I was never in one place as a rule all the time.

Q. By the Court: You mean you never sat through the entire performance?

A. From start to finish, except it would be dress rehearsal before the opening the first day.

Q. But you were in and out of the show at all times during the performance of your work as manager?

A. Yes, your Honor.

Q. By Mr. Marcus: On this particular day do you remember Mr. Pat Valdo being there? A. Yes sir.

Q. Who else was there with him?

A. Well, the Ringling show happened to be close to us on that day. This was on Monday. I don't think they worked that Sunday. There was four or five visitors over from the Ringling show.

Q. Do you remember this boy who gave his name as Yacopi? Do you remember his being one of the visitors there that day? A. I don't remember him.

(Testimony of Sylvester Cronin)

Q. But you do remember there were several visitors?
[407]

A. Yes. That day Mr. Valdo came over, and Mickey Blue, the boss property man with the Ringling show, Mr. Braden, the equestrian director, and his wife; and there were some other people there; I don't know who they were.

Q. Did they go into the circus prior to the time the show started?

A. I suppose they were sitting in the seats when the show started. I suppose they came from the dressing room. As a rule, when performers visit another show they go back to what we call the back yard and visit among the people, and come in when the show is ready to start.

Q. Do you have any independent recollection at this time as to whether Mr. Pat Valdo and yourself went into the main tent prior to the time the show started?

A. We went in just about the time the show started and sat down in the seats. I was with him a few minutes.

Q. Do you remember looking around and seeing a trapeze up there at that time?

A. I don't remember.

Q. You don't remember whether it was up or not?

A. That early?

Q. At that time. A. No.

Q. But you do remember, however, seeing her on the trapeze? A. Yes, sir. [408]

Q. Do you remember who the prop boys were?

A. I don't remember.

Q. You say that they came and went quite often?

A. Yes.

(Testimony of Sylvester Cronin)

Q. Sometimes you had more; sometimes less?

A. We had what we call in the job our foundation men practically there all the time; and they need an extra man, and they drop him, and they fill in; but the riggers were usually there all the time.

Q. Who paid the riggers? A. The circus.

Q. Who paid the prop men? A. The circus.

Q. Were these prop men that held the net?

A. Riggers, do you mean?

Q. No, prop men.

A. Prop men and riggers both used to hold. We had three rings; sometimes they would be getting the acts ready in the different rings. The prop department, if I am not mistaken, was allowed 27 or 37 men when they had full crews.

The Court: You want to find out who paid the men that held the net?

Mr. Marcus: Yes.

The Court: I wish you would find out, Mr. Marcus. You are taking too much time on cross-examination.

Mr. Marcus: I am sorry. [409]

Q. Mr. Cronin, did you watch them when they held the net that day? A. Yes, sir.

Q. You saw her fall, you stated on direct examination?

A. Yes.

Q. She fell about a foot and a half or two feet from the net? A. I would say that, roughly.

Q. And you saw the net did not move?

A. The net move forward?

(Testimony of Sylvester Cronin)

Q. Move any way.

A. I don't remember. The net was right under the act. That's where they placed it, so in case she should fall.

Q. You don't remember seeing the net moving, do you?

A. No, sir.

Mr. Marcus: That is all.

Mr. Combs: No redirect.

(The Court after admonishing the jury here took a short recess.)

Mr. Combs: We want to read the testimony of Howard Mentz, your Honor. Mr. Corkery, would you be kind enough to take the stand?

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

Mr. Combs: Deposition of

HOWARD MENTZ.

"Q—What is your name? [410]

"A—Howard Mentz.

"Q—What is your age?

"A—31 years.

"Q—Where do you reside?

"A—Tampa, Florida.

"Q—Do you reside there at present?

"A—Yes.

"Q—Is that your permanent home?

"A—No.

"Q—Do you expect to be residing there on January 16, 1940?

"A—I do not know.

"Q—Will you be in California during the month of January, 1940?

"A—I don't know that either.

"Q—Where will you be then?

"A—Probably Tampa. I don't know.

"Q—What is your occupation?

"A—Rigger.

"Q—How long have you been engaged in that occupation?

"A—Ten years.

"Q—State with whom you have been employed as a rigger.

"A—Al G. Barnes Circus, Sells Floto Circus.

"Q—State the periods of time you have been so employed and for whom employed during said periods of time.

"A—Sells Floto Circus 1929 to 1930; Al G. Barnes Circus [411] 1930 to 1938.

"Q—Explain what you did as rigger for the Al G. Barnes-Sells Floto Combined Circus.

"A—On the Sells Floto Circus I put up performers' riggings and worked props; on the Al G. Barnes circus I superintended putting up riggings and put up riggings myself. Of course, in both cases—"

The Court: When the court first stated the names of the defendants, I think I was referring to the original complaint, and I believe the Sells-Floto Circus, as a defendant, was dismissed by stipulation in this case.

(Deposition of Howard Mentz)

Mr. Combs: Yes; but I think the witness here was testifying as a foundation.

The Court: That is all right; but I was trying to correct the statement of the court.

Mr. Combs: Yes, the defendants are Ringling Bros. and Al G. Barnes Amusement Company.

“Q—Is that the circus operated during the 1937 by the Al G. Barnes Amusement Co.?

“A—I don’t know the name of the corporation that owns the circus. We called it the Al G. Barnes show.

“Q—Did you work for them as a rigger?

“A—Yes.

“Q—For what period of time?

“A—1930 to 1938.

“Q—Do you work as a rigger now? [412]

“A—No.

“Q—What did you do for the Al G. Barnes Amusement Co. when you worked for them as a rigger?

“A—I superintended the erection of the riggings which was—

“Q—What did you do for anyone else as a rigger?

“A—Nothing except as I have testified before.

“Q—Did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

“A—I was employed by them and superintended riggings at that time but had recently broken my ankle and did no actual work on that day.

“Q—Did you know America Olvera Pollinger, the plaintiff in this action?

“A—Yes.

(Deposition of Howard Mentz)

"Q—When did you first meet her?

"A—At the opening of the 1937 season in March when she came on the Al G. Barnes show.

"Q—Did you ever act as a rigger for her?

"A—Yes.

"Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

"A—Yes.

"Q—State at what times you acted as a rigger for America Olvera Pollinger.

"A—From the opening of the 1937 season until I broke my [413] ankle in July or August 1937 and then I superintended the erection of her rigging but did no actual work.

"Q—What were you doing on the date of September 12, 1937?

"A—I was with the circus and watched the show at the afternoon performance.

"Q—Did you act as a rigger for America Olvera Pollinger on that day?

"A—I superintended putting up her riggings that day but did no actual work. I was on crutches as I was still suffering from a broken ankle.

"Q—Was the rigging used by America Olvera Pollinger on September 12, 1937, the same rigging used by her during the entire show season of 1937, previous and up to September, 12, 1937?

"A—Yes.

(Deposition of Howard Mentz)

"Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

"A—I superintended putting up her riggings that day but no actual work.

"Q—Did you observe America Olvera Pollinger perform her act on the 12th of September, 1937?

"A—I did.

"Q—Did you know Carl Pollinger?

"A—Yes.

"Q—When did you first meet him? [414]

"A—The same time I met her, at the beginning of the season.

"Q—In what connection?

"A—We were both employees of the same circus.

"Q—Was he present at Anthony, Kansas, on September 12, 1937?

"A—Yes.

"Q—Do you know what he was doing at that time?

"A—He had an act with the circus.

"Q—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—No.

"Q—What did he do in that connection?

"A—He did nothing in that connection.

"Q—Did he help America Olvera Pollinger perform her act that day?

"A—Yes.

"Q—What did he do in that connection?

"A—He assisted her in her act. He pulled her up in her trapeze on a rope and swung her after she got in the trapeze

(Deposition of Howard Mentz)

"Q—Did you see America Olvera Pollinger on said date at or about the hour of 3:30?

"A—Yes.

"Q—What was she doing?

"A—Getting ready for her act.

"Q—What occurred? [415]

"A—She stood in the connection by the bandstand and was having conversation with the boss property man and a few others. She walked over with her husband and the boss property man and looked over the rigging. She signaled to the boss property man for adjustments to be made in the rigging—to level it—which was then done. She then walked into the ring to begin her act.

"Q—Relate in detail exactly what transpired with relation to America Olvera Pollinger's act on the trapeze.

"A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her month from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground.

"Q—State where you stood.

"A—I didn't stand. I was sitting about half way up in the reserved seats on the end of a row directly opposite the center ring over which she was doing her act.

"Q—State exactly and in complete detail, everything you saw.

"A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then

(Deposition of Howard Mentz)

swung [416] the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground—

“Q—Finish the answer.

“A—(Continuing) Her husband, with a number of other men, rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—Who else was there?

“A—A number of people.

“Q—Give their names.

“A—I remember Mr. Pollinger, Blackie Williams, Superintendent of Props, Jose Horton, Thomas Parsons, Philip LaBay, Chandler Miller, Robert Thornton, and probably other whose names I cannot now remember.

“Q—When America Olvera Pollinger fell, what occurred?

“A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on [417] the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and

(Deposition of Howard Mentz)

fell to the ground. Her husband, with a number of other men, rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—Was anything said by America Olvera Pollinger at that time?

“A—No, I didn’t hear her say anything; she appeared to me to be unconscious.

“Q—Now you may relate exactly what was said by you and what was said by America Olvera Pollinger, and what was said by Carl Pollinger and any other persons there in the presence of America Olvera Pollinger.

“A—I didn’t hear them say anything; they were busy rushing her out of the tent.

“Q—State the names of the individuals in so far as you can remember them, who helped in the erection of America Olvera Pollinger’s rigging on September 12, 1937?

“A—A boy who we called Whitie and other employees whose names I do not remember.

“Q—Do you know whether or not the America Olvera Pollinger rigging was inspected after erected on September 12, 1937, prior to her going on in her act? [418]

“A—Yes.

“Q—Who inspected it?

“A—She and her husband inspected it.

“Q—What was done in that connection?

“A—She and her husband looked it over and she signaled to the boss property man to level off her rigging.

(Deposition of Howard Mentz)

“Q—Can you state what the condition of the rigging was at that time?

“A—It was very good.

“Q—Relate exactly how it looked when it was in the air.

“A—It looked level and in the same condition it always was.

“Q—Describe in detail the position of each guy rope, hook, eye, clevis, cable, wire, cross bar, or other portion of the equipment.

“A—The trapeze bar upon which she stands or sits when she performs her act is a steel bar $\frac{7}{8}$ of an inch thick and about four feet long. It is suspended from a bar known as the crane bar by steel cables $\frac{3}{8}$ or $\frac{1}{2}$ inch thick. These cables are attached to the crane bar by means of metal hooks known as sister hooks or marine hooks, these hooks being in the form of a figure eight. These cables are about $10\frac{1}{2}$ feet long and instead of being attached directly to the trapeze bar are attached to solid steel bars about $\frac{1}{2}$ inch thick and $1\frac{1}{2}$ feet long which in turn are attached to the trapeze bar at right angles making the total distance from [419] the crane bar to the trapeze bar about 12 feet. The crane bar is a metal tube about $1\frac{1}{2}$ inches in diameter and about 5 feet long. It is suspended by means of ropes and pulleys from metal bail rings which are attached to the center poles which hold up the tent. The crane bar is kept steady by means of four quarter inch steel cables known as guy lines which in turn are attached to pulley blocks by steel hooks, the pulley blocks being attached to stakes driven in the ground by means of a rope loop known as a becket. These pulley blocks serve the

(Deposition of Howard Mentz)

purpose of allowing guy lines to be quickly tightened and enable the rigger to keep the rigging level. The connection between the crane bar and guy line cables is made through a clevis which is a U-shaped device with a pin which completely closes the open end of the U. At each end of the trapeze bar are metal stars which add weight to the trapeze.

“Q—Is that a full and complete description of the exact condition of said equipment immediately after it was put in place and before America Olvera Pollinger took her place upon the trapeze?

“A—It is.

“Q—What occurred after she took her place on the trapeze?

“A—Her husband pulled her up by a rope in the trapeze. She did her usual balancing tricks on the bar; she then swung the trapeze both sideways and forward; she then got [420] into a high swing assisted by her husband who was on the ground holding a long rope; as the swing died down, she knelt on the trapeze bar with her hands free. She was about to lean down and pick up a handkerchief in her mouth from the trapeze bar and was at the front of her swing when she lost her balance and fell to the ground.

“Q—Did you see America Olvera Pollinger fall?

“A—Yes.

“Q—When did she fall?

“A—Near the end of her act when she was on her knees on the trapeze bar with her hands free just before leaning over to pick up the handkerchief in her mouth from the trapeze bar.

(Deposition of Howard Mentz)

“Q—Describe what you observed in connection therewith.

“A—She lost her balance and fell at the moment when she was at the front of her swing.

“Q—How did she fall?

“A—She fell head first but landed on her side.

“Q—Where did she fall?

“A—Just inside of the ring.

“Q—Was there a net underneath the trapeze?

“A—Yes.

“Q—Describe said net.

“A—A piece of heavy canvas about 10x15 feet with handholds made of rope around the outer edge.

“Q—How many men held on to the same? [421]

“A—Six or eight men.

“Q—State as many of their names as you can.

“A—Joe Horton is the only one whose name I now remember.

“Q—How many in all were there on the net?

“A—Six or eight.

“Q—Where was the net located when Mrs. Pollinger fell?

“A—Directly under the crane bar.

“Q—Did you look at the rigging after she fell?

“A—Yes.

“Q—If so, state what you observed in connection therewith.

“A—Both the trapeze bar and crane bar were the same as when she went up on it, absolutely level.

(Deposition of Howard Mentz)

“Q—State the exact condition, position and location, of every guy rope, cable, hook, eye, cross bar, wire, and portion of said equipment after Mrs. Pollinger fell.

“A—The trapeze bar upon which she stands or sits when she performs her act is a steel bar $\frac{7}{8}$ of an inch thick and about four feet long. It is suspended from a bar known as the crane bar by steel cables $\frac{3}{8}$ or $\frac{1}{2}$ inch thick. These cables are attached to the crane bar by means of metal hooks known as sister hooks or marine hooks, these hooks being in the form of a figure eight. These cables are about $10\frac{1}{2}$ feet long and instead of being attached directly to the trapeze bar are attached to solid steel bars about $\frac{1}{2}$ inch thick and $1\frac{1}{2}$ feet long which in turn are attached to the [422] trapeze bar at right angles making the total distance from the crane bar to the trapeze bar about 12 feet. The crane bar is a metal tube about $1\frac{1}{2}$ inches in diameter and about 5 feet long. It is suspended by means of ropes and pulleys from metal bail rings which are attached to the center poles which hold up the tent. The crane bar is kept steady by means of four quarter inch steel cables known as guy lines which in turn are attached to pulley blocks by steel hooks, the pulley blocks being attached to stakes driven in the ground by means of a rope loop known as a becket. These pulley blocks serve the purpose of allowing guy lines to be quickly tightened and enable the rigger to keep the rigging level. The connection between the crane bar and guy line cables is made through a clevis which is a U-shaped device with a pin which completely closes the open end of the U. At each end of the trapeze bar are metal stars which add weight to the trapeze.

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“Q—Did you observe whether or not she was injured?

“A—She was apparently unconscious but I could not observe the extent of her injuries.

“Q—Relate the times when you saw America Olvera Pollinger perform on her trapeze.

“A—Practically every performance during the 1937 season prior to the time of her injury.

“Q—Relate the times when you observed the rigging upon which she performed. [423]

“A—Practically every day except when I was in bed with a broken ankle.

“Q—Do you know whether or not it was rigging supplied by her?

“A—Yes, it was her rigging.

“Q—If so, state.

“A—Yes, it was supplied by her.

“Q—Have you had occasion to observe the use of rigging for other trapeze acts?

“A—Yes.

“Q—State what experience you had in observing and examining equipment or rigging used for trapeze acts.

“A—For about ten years with the Al G. Barnes show and Sells Floto show. In addition to this I have built riggings myself.

“Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?”

Mr. Marcus: I believe that portion of the transcript, your Honor, where there was a stipulation entered into

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between counsel and me, with respect to the answers to questions 61 and 78, which were identically the same as the other questions, when they were answered, were stipulated by counsel and me at the time the deposition was previously read that they were identical, word for word.

Mr. Combs: What are you talking about, counsel?
[424]

Mr. Marcus: You haven't got it in your book.

Mr. Combs: Let me take a look at it in your book.

Mr. Marcus: May it be stipulated they are exactly the same, and are word for word the same as the other interrogatories?

Mr. Combs: Yes.

The Court: What was the number of the interrogatory?

Mr. Marcus: They were Nos. 61 and 78.

The Court: In other words, it would be a repetition?

Mr. Marcus: Yes.

Mr. Combs: All right, your Honor, so stipulated again.

"Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?

"A—Yes.

"Q—Describe the same.

"A—The hooks are made of steel in the shape of a figure eight completely closed but can be opened like a pair of scissors. There is a pin in the center of the figure

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eight which holds the two parts of the figure eight together. They cannot be opened when there is any weight on them.

“Q—Are you familiar with the attachment of guy wires to the upper cross bar?

“A—Yes.

“Q—Describe the same.

“A—Four steel guy lines or cables about $\frac{1}{4}$ inch thick, [425] 25 to 30 feet long, with a spliced eye on each end and which in turn are hooked to the crane bar by a shackle or clevis.

“Q—How long did it take for America Olvera Pollinger to perform her act?

“A—Four and one-half to five minutes.

“Q—In your opinion, would it be possible for one of the upper marine hooks holding the lower cross bar to become tangled or overlapped in a manner which would result in the same being hooked over the top of the eye extending from the upper cross bar downward?

“A—It would be possible but very improbable.

“Q—If it could be so tangled or overlapped, what would be the effect on the lower cross bar?

“A—One end of the lower cross bar would be higher than the other end which would immediately be noticeable to anyone observing the rigging.

“Q—In your opinion, would it be possible for the guy wires attached to the clevis on the upper cross bar to be so arranged that the extension cables reaching from the upper to the lower cross bar would be uneven in length

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and the lower cross bar be in other than a true horizontal position?

"A—No. Because the guy lines have no relation to the length of the cables supporting the trapeze bar."

Mr. Combs: No. 96 was sustained; 97 was sustained, wasn't it?

Mr. Marcus: Yes. [426]

Mr. Combs: 98 went out.

"Q—Would it be possible for the force exerted on a cross bar caused by a performer falling from the cross bar or the back lash of the cross bar to tangle or overlap the marine hooks attached to the upper cross bar?

"A—In my opinion it is not possible.

"Q—If the marine hooks were so tangled or overlapped, what would be the effect on the lower cross bar?

"A—One end would be lower or higher than the other.

"Q—Could this effect be observed by those on the ground under the cross bar?

"A—Yes.

"Q—In your opinion would it be possible for the clevis to which the main support and upper guy ropes or wires were attached to the upper cross bar to have become twisted when the rigging was put up in a manner so that the guy wires and main support cables or ropes were not evenly adjusted in the curve of the round end of said clevis and to remain in that position during the entire portion of America Olvera Pollinger's act to and until the time when she rose for her final bow on the cross bar?

"A—In my opinion it would not be possible.

"Q—In your opinion, would it have been possible for America Olvera Pollinger to have performed her entire

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act up to the last few seconds with the upper large hook connecting the main bar to the falls in the abnormal position herein- [427] before described, being held in place by the guy wires until America Olvera Pollinger rose for her last bow, and to slip down at that time?

"A—No, it would not."

Mr. Combs: I guess we go now—

Mr. Marcus: To volume 5, page 504, line 20.

Mr. Corkery: What is the interrogatory now?

Mr. Combs: Cross interrogatory No. 1.

(Interrogatories read by Mr. Marcus; answers read by Mr. Corkery.)

"Q—Is it not a fact that your salary was paid by the Al G. Barnes Show?

"A—My salary was paid by the Al G. Barnes Show but in addition Mrs. Pollinger gave me the sum of \$4 or \$5 each week for looking after and taking care of her rigging, as is customary in the show business.

"Q—How much was your salary per month?

"A—Al G. Barnes paid me around \$80.00 a month with my board. I was paid every week and received \$17.50 each week.

"Q—Were you paid in cash or by check?

"A—I was paid in cash.

"Q—Please name the person who paid you your salary.

"A—Theodore Forestal.

"Q—Is it not a fact that you erected the rigging of all of the trapeze performers in the Barnes Show? [428]

(Deposition of Howard Mentz)

"A—I did not personally erect the rigging for all trapeze performers in the Barnes Show but the erection of all rigging of the trapeze performers was done under my personal supervision.

"Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes Show?

"A—I supervised the erection of the rigging in the Barnes Show during my entire period of employment except for the weeks or so that I was laid up with a broken ankle.

"Q—Is it not a fact that the erection of the rigging was the work for which you were employed by the Barnes Show?

"A—Yes.

"Q—Is it not a fact that on September 12th, 1937, you were suffering from the result of an accident to your foot and that your foot was in a cast?

"A—Yes.

"Q—Is it not a fact that on September 12, 1937, you did not erect the rigging or assist in erecting the rigging on the America Olvera or of any other trapeze or rigging in the show?

"A—I did on this day assist and did supervise erecting the rigging on America Olvera and all of the other trapeze performers in the show.

"Q—For what period of time prior to September 12, 1937, were you unable to erect the rigging or assist in erecting [429] the rigging of the performers in the show?

"A—It was for a period of one week. The best I can remember I had been back supervising the erection on

(Deposition of Howard Mentz)

the rigging for at least four or five days prior to September 12, 1937.

"Q—Is it not a fact that on September 12, 1937, you were not present at the time that Miss Olvera's rigging was set up?

"A—It is not a fact. I was present.

"Q—Is it not a fact that a bone in your foot was fractured prior to September 12, 1937?

"A—Yes.

"Q—Is it not a fact that many employees of the Barnes Show erected the rigging of the different performers prior to September 12, 1937?

"A—The only employees of the show who erected the rigging of the different performers prior to September 12, 1937, were eight men under my supervision who were employed for that purpose.

"Q—Name the different persons who erected the rigging?

"A—Charles Huey, Neville Bailey, Lawrence Lance, Phillip La Bay, Tom Parsons, a fellow named James whose last name I cannot recall, and I can't recall the names of the rest of them.

"Q—Is it not a fact that on September 12, 1937, you first learned of the accident after Miss Olvera was taken to [430] the hospital?

"A—No, I was present when the accident happened.

"Q—Is it not a fact that you first met Karl Pollinger on September 12, 1937, as he was leaving the hospital where Miss Olvera was taken?

"A—I saw Karl Pollinger on September 12, 1937, on the circus lot just before Miss Olvera performed her act.

(Deposition of Howard Mentz)

I did not talk to him at that time. I was sitting in the grandstand seats and I do not know whether he saw me or not.

"Q—Is it not a fact that at said time and place the following conversation took place between yourself and Karl Pollinger? You stated, 'I am very sorry, Mr. Pollinger, that I was not there during the time that the rigging was erected because if I had been there the rigging would have been put up right and the accident would never have happened.' Mr. Pollinger stated, 'You boys do not pay enough attention to putting up the rigging correctly.'

"A—I had no such conversation with Mr. Pollinger and made no such statement to him. I did say to Mr. Pollinger that I was sorry that the accident happened and inquired how Miss Olvera was getting along. Mr. Pollinger never made the statement to me then or at any other time, 'You boys do not pay enough attention to putting up the rigging correctly.'

"Q—Is it not a fact that you had a conversation with Karl Pollinger in Hollywood on Fairfax Avenue at the time that the show was showing in Hollywood in the year 1938 and [431] you stated to Mr. Pollinger the following: 'Karl, I want to tell you something. I was called to the front wagon by the show and the big boss said to me, "Tell me what you know about this accident of America." So I told the boss, "I don't know anything about the accident, you know at the time I had my foot broken and I wasn't on the grounds." So the boss said to me, "You have to remember what happened if you want to keep your job. So go back and think it over."' Then Pollinger said, 'Good for you, Howard, you did the

(Deposition of Howard Mentz)

right thing.' Then you stated, 'Don't worry, Polly, there are many men around here who will tell the truth.'?

"A—I never had such conversation with Karl Pollinger.

"Q—Prior to September 12th, 1937, how many times did you erect the rigging of Miss Olvera during the entire season?

"A—I supervised and helped erect the rigging of Miss Olvera twice a day, and after my ankle was broken there was a period of approximately a week that I was not on the circus lot and did not supervise or help erect the rigging of Miss Olvera. I had been back supervising and helping erect the rigging of Miss Olvera four or five days prior to September 12, 1937.

"Q—Is it not a fact that the rigging was erected twice each day for the two performances that were given during the season of 1937?

"A—Yes. [432]

"Q—Is it not a fact that you were not in the circus tent at the time that Miss Olvera performed on September 12, 1937, nor did you see her fall from the trapeze?

"A—I was in the circus tent sitting in the grandstand seats at the time Miss Olvera performed on Sept. 12, 1937, and did see her lose her balance and fall from the trapeze.

"Q—State what color costume she wore at the time she performed her act on September 12, 1937?

"A—I do not recall the color of the costume she wore on that day as she had different colored costumes which she wore.

(Deposition of Howard Mentz)

"Q—If your answers to your direct interrogatories are 'Yes' to seeing the accident, is it not a fact that you are so stating in order to retain your position with the Ringling Show?

"A—No. I can get other jobs.

"Q—State the names of the persons present after Miss Olvera fell to the ground from the trapeze?

"A—The boys I can remember are Phillip La Bay, Tom Parsons, Joe Horton, Chandler P. Miller, George Blackie Williams, Robert Thornton, Chas. Huey, Lawrence Lance, Karl Pollinger and other property men whose names I cannot recall.

"Q—Is it not a fact that the net was supplied by the Barnes Show?

"A—I am not sure, but I think the nets were supplied by the Barnes Show. [433]

"Q—Is it not a fact that the employees of the Barnes Show held the net?

"A—Yes.

"Q—Is it not a fact that some of the same employees who erected the rigging held the net? Name them.

"A—Just two of the men erecting the rigging held the net, namely, Tom Parsons and Joe Horton.

"Q—Did you hold the net?

"A—No.

(Deposition of Howard Mentz)

“Q—State what happened after Miss Olvera fell?

“A—Her husband with a number of other men rushed to her and her husband picked her up assisted by a few more property men and they rushed her out of the main tent. They came right by me where I was sitting and she appeared to me to be unconscious.

“Q—State if anything was said by her, if so, what?

“A—I heard her say nothing. She seemed to be unconscious.

“Q—Is it not a fact that you stated to Karl Pollinger in Baldwin Park, California, during the early part of the year in 1938 that the Barnes Show paid you \$10.00 to keep Pollinger from Miss Olvera's apparatus so that the Barnes Show could break open her trunk, take out the apparatus and take pictures of all the parts and that you thereupon stated, ‘Don't worry, Polly, there is nothing missing, I give you my word of that.’ Karl then stated, ‘Tell me who [434] it was that broke into the box and I will give you ten (\$10.00) dollars.’ And you said, ‘No, wait until the season is over and I'll tell you the name and plenty of things you don't even dream about.’

“A—It is not a fact; I never had any such conversation.”

Mr. Combs: That finishes the deposition of Mr. Mentz.

(The Court after admonishing the jury took an adjournment until 2:00 o'clock p. m.) [435]

AFTERNOON SESSION.

2:00 O'CLOCK.

(Stipulated that the jurors were present and in the box.)

Mr. Combs: At this time, your Honor, we will proceed with the reading of the testimony of William Matlock.

The Court: What page is it?

Mr. Corkery: Page 578, your Honor.

(Questions read by Mr. Combs; answers read by Mr. Corkery.)

WILLIAM MATLOCK,

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

"Q—Will you state your name?

"A—William Matlock.

"Direct Examination.

"Q—Where do you reside, Mr. Matlock?

"A—Baldwin Park.

"Q—What is your occupation?

"A—I am now half owner of a small circus at Baldwin Park.

"Q—At Baldwin Park?

"A—Yes, sir.

"Q—What is the name of that circus?

"A—Metrella Brothers.

"Q—Are you employed by Barnes Amusement Company at the [436] present time?

"A—No, sir, not at present.

(Deposition of William Matlock)

“Q—Are you employed by Ringling Bros. Barnum & Bailey at the present time?

“A—No, sir.

“Q—Were you ever employed by either of those corporations?

“A—Yes, sir.

“Q—And by which one?

“A—By the Al G. Barnes.

“Q—Were you ever employed by Ringling Brothers?

“A—I was, yes.

“Q—When?

“A—That was the closing of the season in 1938.

“Q—In 1938, the close of the season?

“A—Yes, when they combined from Al G. Barnes to Ringling.

“Q—When they combined from Al G. Barnes at the close of the season in 1938?

“A—No, in the middle of the season we combined, in Northern California.

“Q—What was done on the combination, as far as you know?

“A—As far as I know, nothing was done on the combination except a change of managers.

“Q—you say ‘combined.’ On what do you base your statement that they were combined at that time?

“A—I think the Ringling show had a strike in Scranton, Pennsylvania, and they closed the show up. [437]

“Q—They closed the show?

“A—And they brought part of their equipment over to the Barnes show.

(Deposition of William Matlock)

"Q—That was what you meant by the combination you referred to?

"A—Yes, sir.

"Q—And that is all you know about the combination?

"A—That is all I know about the combination.

"Q—The fact is that some Ringling stuff was brought from Pennsylvania to the Barnes show?

"A—That is right.

"Q—Do you know what that stuff was?

"A—I couldn't say all of it, no. Part of the paraphernalia and part of the Barnes show; they mixed it together.

"Q—Then you don't know whether they actually combined or not?

"A—No. As we say, 'combined.'

"Q—But that combination was merely just what you have stated here was done?

"A—Yes, that is right.

"Q—How long were you employed by the Al G. Barnes?

"A—Since the opening of the season in 1927.

"Q—Since 1927?

"A—Yes.

"Q—Until what time?

"A—Up until the date that we combined, that is, had the [438] show to go in the northern part of the State. I don't recall the date exactly.

"Q—In the fall of 1938?

"A—Yes, sir.

(Deposition of William Matlock)

“Q—In what capacity were you employed by the Al G. Barnes Circus during that period of time you state you were employed by them?

“A—From 1927 up until 1932—

“Q—What kind of work did you do?

“A—I was a performer up until 1932.

“Q—Then what did you do?

“A—Then I was transferred on the front door, ticket taker, up until 1935.

“Q—Then what?

“A—Then I had the exchange desk on the front door; that is, the exchange of stubs of passes to the reserved seats on the inside.

“Q—And was it in that capacity that you were employed by the Barnes Company at the time Miss Olvera fell on the 12th of September, 1937?

“A—What is that?

“Q—I will withdraw the question. What capacity were you employed in at the time of the fall?

“A—In the same capacity, exchange desk on the front door.

“Q—Who paid your salary?

“A—Al G. Barnes Circus. [439]

“Q—Do you know Theodore Forstall?

“A—Very well, yes, sir.

“Q—What was his capacity?

“A—He was treasurer of the show.

“Q—Of what show?

“A—Of the Al G. Barnes Circus.

(Deposition of William Matlock)

"Q—On the day of September 12, 1937, did you observe America Olvera Pollinger?

"A—I did.

"Q—Before that how long had you known her?

"A—At the opening of the season of that year.

"Q—Did you know Karl Pollinger, her husband?

"A—Yes, sir, at the same time.

"Q—Then you met him at the same time?

"A—Yes, sir.

"Q—Where were you at the time of about 3:30 p. m. on the day of the 12th of September, 1937?

"A—I was sitting in the reserved seats, in between Sections D and E, in the second seat in the third row.

"Q—Describe to the jury just approximately where that was with relation to Miss Olvera's act.

"A—The sections run from A to H in the grandstand on the front side. The D and E aisle is practically in the center of the center ring, and I was sitting on the E side, because the D side was a pass side from the front door, that we issued. The E side was 'Sold tickets,' cash tickets, and [440] the E side is reserved.

"Q—Describe your occasion for being there at that time.

"A—We have ushers on the show that usher the people in, and we watch these stubs—we give them two or three seats for the seats in the front—and as they come into the gate sometimes the ushers misplace these people, because they know they are pass tickets, and they sell the tickets to some one else.

(Deposition of William Matlock)

“Q—You were ‘spotting’ them in that capacity, were you?

“A—I was sent there by Mr. Karsh, yes.

“Q—Did you observe Miss Olvera perform her act at that time?

“A—I sat there at the time, yes, sir.

“Q—That she was performing?

“A—Yes, sir.

“Q—How far, in number of feet, as best you can give it, were you from the point where she was actually performing?

“A—About—I would say about 35 or 40 feet.

“Q—35 or 40 feet?

“A—Yes, from the end of the ring.

“Q—Was she facing the part of the stand you were in?

“A—I was facing her, yes.

“Q—Facing her act there?

“A—Yes.

“Q—Will you relate to the jury exactly what you observed on that occasion at that time and place in connection with [441] Miss Olvera? Just relate it in your own words to the jury.”

Mr. Marcus: Just a minute. That was stricken.

The Court: Read the question and objection.

Mr. Combs: That is correct. I asked the question again in a few lines further:

“Q—Just relate what you saw her do and what did you hear her say, if anything, on that occasion?

“A—I never heard her say a thing.

(Deposition of William Matlock)

"Q—All right, relate what you saw her do and what you saw happen to her, if anything.

"A—Do you mean when she fell? She fell to the ground.

"Q—Well, start from the time she fell, and relate what happened until after she fell.

"A—All right.

"Q—Go ahead, all that you remember.

"A—I walked into the second seat and sat down into the second seat. I was watching an usher and expecting him to move these people, and then Miss Olvera started her act, and when she did I naturally sat there and watched the act, because I was interested in it, and she was doing her work all the way through her act as usual.

"Q—Did you observe anything unusual about the trapeze apparatus at the time?

"A—Positively no.

"Q—Did you look at the trapeze apparatus?

"A—I always did. [442]

"Q—What was the occasion for your always looking at the trapeze apparatus when you see performers?

"A—Because I have put up and taken down rigging for 32 years.

"Q—And you do it from force of habit, do you?

"A—Naturally.

"Q—Did she fall on that occasion?

"A—Yes.

"Q—Just state what you observed. Did you observe her on her knees, picking up the handkerchief?

"A—Yes; I observed her picking up the handkerchief from her knees on the bar. Yes; she got the handkerchief up.

(Deposition of William Matlock)

"Q—And then what occurred?

"A—She started to make a style at the audience.

"Q—You saw that?

"A—That was a one-arm style.

"Q—By 'style' what do you mean; a bow or a curtsy or something?

"A—Well, a curtsy bow with her hands; yes.

"Q—What occurred to her then when she did that?

"A—At the end of the swing it caught her just over-balanced and fell forward.

"Q—She fell forwards?

"A—Yes; she fell forwards.

"Q—Where did she fall?

"A—Just missed the ring curb. [443]

"Q—Just missed the ring curb?

"A—Yes.

"Q—Was there a net below her at that time?

"A—The net was not below her. It was below the bar, naturally.

"Q—It was centered under the trapeze?

"A—Centered under the trapeze; yes.

"Q—How many carried the net?

"A—There was 8 men, as I recall, 8 men.

"Q—Now relate what you did later on, or from that point on.

"A—After the fall I got up out of the seat, which I have to walk around from the front side to the back side as we can't cut across—"

(Deposition of William Matlock)

Mr. Marcus: Just a minute. I believe that entire answer went out.

Mr. Combs: Oh, yes; it did. I am sorry. We stipulate that what has been read may be stricken at this point.

The Court: It is so ordered.

“Q—Just relate now what you observed America Olvera Pollinger do during the time you remained in your seat.

“A—Well, she did two swinging tricks and standing—I think there was two, and I can’t recall all the tricks because I am not in the tent all the time.

“Q—Relate, however, what she did immediately after she fell, what occurred at that time. [444]

“A—Well, immediately after she fell she lay there and they had to pick her up and take her out.

“Q—Who picked her up and took her out?

“A—I don’t recall who it was taken her out of there, because I was more interested in the rigging. I got up and left immediately after.

“Q—Just after she fell you left?

“A—Yes.

“Q—Before leaving did you have occasion to look at her rigging?

“A—Yes; I noticed her rigging because I didn’t know whether anything broke or how come the fall.

“Q—What did you observe in that connection?

“A—Well, I just observed the rigging as usual.

“Q—The same condition as it was before she started her act?

“A—Yes, sir.

(Deposition of William Matlock)

“Cross Examination.

(Questions read by Mr. Marcus; answers read by Mr. Corkery):

“Q—Mr. Matlock, you are acquainted with Mr. La Bay, are you not?

“A—Why, yes, sir.

“Q—How long have you known him?

“A—I have known Mr. La Bay practically two years.

“Q—Prior to the date that this accident happened?
[445]

“A—No, no. One year prior to the date.

“Q—You saw him in court, or have you seen him here in court?

“A—No, sir.

“Q—He is living at Baldwin Park, is he not, at the present time?

“A—I don't know. I do not know.

“Q—Have you seen him there at Baldwin Park?

“A—Yes. He came into Baldwin Park I think it was last Saturday, at my place.

“Q—Last Saturday?

“A—Yes.

“Q—And how often have you—

“A—Friday or Saturday. I am not positive.

“Q—How often have you seen him during the past two years?

“A—I have seen him once with a little circus I had on the road this summer. He visited and come on the show that afternoon, put on a uniform and left that night.

(Deposition of William Matlock)

"Q—You are acquainted with his appearance and you could recognize him if you saw him, could you not?

"A—Yes, sir.

"Q—Did he hold the net that day?

"A—Did he hold it?

"Q—Yes, sir.

"A—I can't recall that. [446]

"Q—You didn't see him hold it, did you?

"A—I couldn't say that, because I don't pay any attention to what men holds the net when you are looking at the act.

"Q—You looked at the net, didn't you?

"A—I observed the net on the ground before the act started, but not after that.

"Q—You observed it on the ground before the act started?

"A—Yes, sir; naturally.

"Q—Did you ever observe the net being lifted up or held by anybody?

"A—Yes.

"Q—Who was it held the net, to your best memory?

"A—To my best memory, was the rigging men on the show.

"Q—Who were they, sir?

"A—Well, to call them by name, I couldn't call the boys by name because I wasn't in the props yet.

"Q—How many men were holding the net?

"A—About 8; just about 8.

"Q—Can you give us the name of one man?

"A—No, I don't think I can, not one man.

(Deposition of William Matlock)

“Q—Were you watching all the apparatus?

“A—I was not—you can’t watch it all at one time, top and bottom.

“Q—Well, did you see all the apparatus that day?
[447]

“A—Yes, sir; I am positive I did. Yes, sir; I saw the apparatus.

“Q—Did you see the top bar?

“A—I did.

“Q—You looked up there to see that?

“A—And also the trap bar.

“Q—The trap bar, you mean the trapeze bar?

“A—That is it.

“Q—The lower bar?

“A—Yes, sir.

“Q—Can you tell us approximately how many feet from the trap bar to the top bar?

“A—About 12 feet, 11 or 12 feet.

“Q—Was the top of the tent curved?

“A—The top of the tent curved?

“Q—Yes.

“A—If it was, this slope—

“Q—Well, was it curved in any way?

“A—The top of the tent may be curved about approximately a few inches, but not enough that that rigging would make any difference, because it doesn’t go as high as the flying rigging.

“Q—No. I am just asking you if you observed the top of the tent curved or not.

“A—No; I didn’t.

(Deposition of William Matlock)

"Q—You didn't notice that? [448]

"A—No; because I was watching the blocks to the bail rings.

"Q—You were watching the blocks to the bail ring?

"A—I was not watching them, but I looked at them.

"Q—What was the occasion of your watching the blocks to the bail rings?

"A—Because I have been putting up rigging in the Al G. Barnes Circus, and 8 years I am in the paraphernalia.

"Q—Did you go in there to watch it that day?

"A—No. I went in there to see that an usher did not misplace some people I sent in on complimentary tickets.

"Q—You were watching for these people too, weren't you?

"A—Not when the act started, because it was all over.

"Q—You looked up there and did you observe those blocks during the entire act?

"A—When an act is working, that is the first thing I look at.

"Q—I say, did you observe these blocks during the entire act?

"A—No; as I say, I was watching the lady part of the time.

"Q—Did you observe the bar when you looked up there?

"A—I observed the bar and trap part together.

"Q—Could you tell whether the trap bar was level or not?

(Deposition of William Matlock)

"A—Yes; because when you get a rigging out and your top bar is level, your bottom bar has to be level with it, [449] otherwise there is something wrong with your rig.

"Q—Could not the top bar be a bit out of line and be held up there by the clevises?

"A—If it is, it should be noticed and it would have been noticed, and I noticed it was not lower because that much difference of two inches would be noticed from the level of your bottom bar and level of your top bar.

"Q—Could not the top bar be level and the bottom bar be out of line if one of the lines is crossed over the sister hook? Would it be possible for the upper bar to be level and the bottom bar would be out of line, if one line was crossed over the sister hook?

"A—That might be; yes, sir.

"Q—It could be?

"A—It could be; yes, sir. But it would be—

"Q—It could be?

"A—Yes, sir. But it would be—

"Q—But the top bar—

"A—But it would be noticeable from anyone that ever put up a rigging in the world.

"Q—In case they were looking up at it?

"A—If you put it up you would look at it.

"Q—If it was out of line two inches on top of this 40-foot or 35-foot tent you could see it?

"A—The rigging isn't that high.

"Q—How high is the rigging? [450]

"A—I imagine the top of the crane bar would be about three, three or four feet.

(Deposition of William Matlock)

"Q—Can you tell in three or four feet at the top of the tent if it was out of line two inches, if you were sitting over in the seats?

"A—If I was in front of it; yes, sir.

"Q—And you looked for that, did you?

"A—Positively; yes, sir.

"Q—How often did you see America Olvera perform her act prior to this occasion that she fell, if any?

"A—I think, at the opening of the season in San Diego is the only time that I saw her besides that, because I am employed in the front door all the time.

"Q—You say you think you saw her in San Diego?

"A—I saw her in San Diego.

"Q—You are sure now that you saw her?

"A—I am not positive, but I saw her one time before that, and where it was I couldn't tell you.

"Q—Do you remember all of the details of her act, sir, at this time?

"A—Not all of the details; no, sir.

"Q—Do you remember all of the tricks to her act at this time, seeing it once?

"A—No, no.

"Q—You do not?

"A—No, sir. [451]

"Q—Can you describe the act to us now?

"A—I can describe just one or two parts that she does, which I noticed plainly.

(Deposition of William Matlock)

“Q—Then, you don’t know whether she had completed her act or not when she fell, do you?

“A—She was right at the completion of her act because all acts complete their act with handkerchief tricks—most all of them I can recall.

“Q—And is that what you base the fact upon when you testified that she had completed her act?

“A—No, sir; but it was the end of the completion of the act, because the time of the act was four minutes or five minutes or whatever it would be, and that would naturally be, but I know it would be the completion of the act, professionally speaking.

“Q—You are basing that upon what you believe, is that right, not what you knew?

“A—I saw the act once before or maybe twice. I am not positive of it, but I saw the act before, but where.

“Q—You say that she was standing up to take a curtsey or a bow?

“A—No; she was on her knees.

“Q—She was on her knees?

“A—Yes, sir.

“Q—And had not stood up?

“A—She had stood up before that; yes, sir. [452]

“Q—When she got her handkerchief off the bar, what did she do?

“A—She fell forward on her style.

“Q—She fell forward, face first?

“A—Yes; that is right.

(Deposition of William Matlock)

"Q—She did not fall backwards?

"A—No, sir; she fell forwards at the end of the swing, just practically, I would call it, at the end of the swing, because it was too far for the net to be under. At the end of the swing the net was too small accordingly.

"Q—The net was too small?

"A—Yes, sir.

"Q—Did you see that?

"A—Well, it naturally would. The net, I don't presume, is over 8 or 9 feet in width.

"Q—And you say you bought that equipment, do you?

"A—Not that equipment; no, sir.

"Q—By the way, whose net was that?

"A—I don't know.

"Q—Was that furnished by Miss America?

"A—I don't know. I couldn't tell you.

"Q—You say that she was standing on her knees on that bar?

"A—She was on her knees; yes.

"Q—Was that when she fell, when she was on her knees?

"A—At the finish of that trick, picking the handkerchief [453] up.

"Q—How did she pick the handkerchief up?

"A—With her mouth.

"Q—Was she holding her hands on the line at the time?

"A—No, sir.

"Q—She was not trying to get hold of the line?

"A—No, sir, not during her trick.

(Deposition of William Matlock)

“Q—At the end of the trick did you see her attempt to reach for the line and miss it?

“A—No; I didn’t.

“Q—Did you see her attempt to stand up from a kneeling position on the bar?

“A—No; because the fall was too sudden.

“Q—You mean you did not see her, or she did not?

“A—I saw her fall forward, directly forward on her style. I didn’t see her reach for nothing.

“Q—And you didn’t see her attempt to stand up on the bar?

“A—No; not in falling.

“Q—Did she ever at any time stand up in the last trick before she fell?

“A—I don’t recall it.

“Q—Did the net move at any time from the position it was in at the beginning of the act?

“A—Well, I don’t know that.

“Q—You say that these shows combined? [454]

“A—I didn’t say they combined. They came together and they changed their staff. The staff was changed from the Ringling to the Barnes show—from the Barnes show to the Ringling, and I was one of the staff and left the show in Wawaso, Wisconsin.

“Q—You say there was a strike in Philadelphia, Pennsylvania, or some place?

“A—Scranton.

“Q—Scranton. And the Ringling Brothers closed up?

“A—That is right.

(Deposition of William Matlock)

"Q—What did they do with their equipment?

"A—Part of the equipment came over to our show, the Barnes show.

"Q—They took Pat Valdo along with that equipment?

"A—Yes, sir.

"Q—Mr. Gumpertz?

"A—With Mr. Gumpertz; yes, sir.

"Q—Then who took charge from that time on?

"A—Mr. George Smith.

"Q—Was Mr. Valdo connected with it?

"A—Mr. Valdo was the assistant director; yes.

"Q—What was Mr. Gumpertz' connection with it?

"A—Mr. Gumpertz was not connected with the show.

"Q—He had not come over to the Ringling at all?

"A—Not to my recollection.

"Q—Did you get all the equipment of the Ringling show? [455]

"A—No.

"Q—Mr. Matlock, what did you observe first on that date in connection with Miss America's act?

"A—The first thing I observed?

"Q—Yes. What did you see first when you sat down in your seat?

"A—Well, naturally, when I sit down in a seat, Miss Olvera, she was just going into her act.

"Q—Exactly what was she doing at the time?

"A—She was doing a standing trick.

"Q—She was already on the bar?

"A—Yes; she was already on the bar when I came into the seats and sat down.

(Deposition of William Matlock)

"Q—She was standing on the bar?

"A—Yes, sir.

"Q—You don't know what had happened previous to that?

"A—No, sir; because I was coming down the hippodrome.

"Q—Did you observe everything that happened in connection with her after that?

"A—No; not everything. I couldn't observe everything.

"Q—You saw two other acts on at the same time, didn't you?

"A—Yes; two trapeze acts on at the same time.

"Q—Did you observe those two during that period of time?

"A—No; not so much as I did her. You would naturally turn your head a little bit, and I couldn't recall what I saw [456] of the other acts; that is, I didn't pay any attention to them.

"Q—How long were you sitting there?

"A—I was sitting there about—I would say about three or four minutes all together.

"Q—Was the act going on during all that period of time?

"A—No; because after the fall, after the fall I got up then after that, a little bit after, and went around to the back side of the tent.

"Q—And were the other acts continuing on at that time?

"A—No; they had finished.

(Deposition of William Matlock)

"Q—They had finished?

"A—They had finished ahead of time; yes, sir.

"Q—They finished ahead of time?

"A—A little bit ahead of time; yes, sir.

Mr. Combs: We will read the testimony of George Williamsson. Page 516. This is the deposition of George Williamsson; interrogatories to be administered to George Williamsson.

(Interrogatories read by Mr. Combs; answers read by Mr. Corkery):

The Court: Is there any of the preliminary part you might eliminate there?

Mr. Combs: Yes, let us start with question 9. The other is just the qualification for the taking of the deposition. [457]

"Q—What is your occupation?

"A—Superintendent of properties.

"Q—How long have you been engaged in that occupation?

"A—For about thirty-five years.

"Q—State with whom you have been employed as a rigger.

"A—Barnum & Bailey, London Hippodrome, Hagenbeck-Wallace, Sells-Floto, Al G. Barnes and Ringling Bros.

"Q—State the periods of time you have been so employed and for whom employed during said periods of time.

"A—From 1904 to 1912 with Barnum & Bailey; from 1912 to 1918, superintendent of the Hagenbeck-Wallace

(Deposition of William Matlock)

show; then I was transferred to Sells-Floto show in 1924 and stayed with that show until 1932, and from there to the Al G. Barnes show—I was transferred to the Al G. Barnes show.

“Q—Explain what you did as rigger for the Al G. Barnes-Sells-Floto Combined Circus.

“A—I was general superintendent of properties and superintended putting the riggings up. The performers always looked over the riggings and inspected them themselves before they went up to perform.

“Q—Is that the circus operated during the year 1937 by the Al G. Barnes Amusement Company?

“A—Yes.

“Q—Did you work for them as a rigger?

“A—No, I was boss property man and superintended putting up the riggings. [458]

“Q—For what period of time?

“A—For the four seasons: 1935, 1936, 1937 and 1938; also I have had thirty years' experience with other big circuses throughout the world, including Mexico, South America and Europe.

“Q—Do you work as a rigger now?

“A—Now, I am general superintendent of the property department of circuses.

“Q—What did you do for the Al G. Barnes Amusement Co. when you worked for them as a rigger?

“A—I never worked for them as a rigger. I was with them as general superintendent of properties, what is called boss prop man; I had complete charge of all the men, including their hiring and firing.

(Deposition of William Matlock)

"Q—What did you do for anyone else as a rigger?

"A—About twenty-five years ago I worked as a rigger but since that time I have been superintendent of rigging and boss prop man continuously. I never missed a season and never had an accident.

"Q—Did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

"A—No, I worked for them on that date as a superintendent of properties and as boss prop man.

"Q—Did you know America Olvera Pollinger, the plaintiff in this action?

"A—Yes, very well. She is of Mexican nationality and [459] I can speak several languages, including Spanish and we had many conversations together, sometimes in Spanish. She always praised my work and gave me gratuities and several times remarked that my work was perfect and that she could rely on anything I did or supervised. She always complimented me and never at any time made any complaint.

"Q—When did you first meet her?

"A—In the spring of 1937.

"Q—Did you ever act as a rigger for her?

"A—No, I was superintendent of properties and boss prop man and supervised the rigging but did not do the rigging myself. I examined the rigging and it was my business to see that the rigging was perfect before Miss America Olvera Pollinger or any other performer did their act. If the riggings were not perfect, I wouldn't let them go on, that is, I would go to the equestrian director and tell him and he would not let them go on and would substitute another act in their place.

(Deposition of William Matlock)

"Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

"A—No, as I said before, I was superintendent of properties and general property man; I supervised and inspected every wire and every cable with the show and examined the ropes and inspected all the equipment used by America Olvera Pollinger and the rest of the performers and on September 12, 1937, and on every other day, I found the [460] rigging and equipment used by America Olvera Pollinger perfect and in A-1 shape before she performed.

"Q—State at what time you acted as a rigger for America Olvera Pollinger.

"A—As I said before, I never acted as rigger but I was superintendent of properties and boss prop man and supervised the rigging before she went up and I also watched the rigging while she was working. Her act was one of the feature acts in the center ring and I always remained right at the feature act to watch every little thing connected with it.

"Q—State what time you acted as a rigger on any equipment used by America Olvera Pollinger.

"A—I believe I have sufficiently answered this question before when I say that I never acted as a rigger but was boss property man and superintendent of props.

"Q—What were you doing on the date of September 12, 1937?

"A—The same thing—superintendent of properties, boss property man.

(Deposition of William Matlock)

“Q—Did you act as a rigger for America Olvera Pollinger on that day?

“A—No, but I was boss property man and superintendent of props and was present during the entire performance on that date and supervised, inspected and examined everything connected with the act of America Olvera Pollinger. Her act [461] was the feature act and it required special attention from me.

“Q—Was the rigging used by America Olvera Pollinger on September 12, 1937, the same rigging used by her during the entire show season of 1937, previous and up to September 12, 1937?

“A—Yes.

“Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

“A—I supervised the erection of all equipment and rigging for the Al G. Barnes Circus and had the rigging man guide it out perfect and I, myself, leveled it off and supervised the leveling off myself. After I gave it my O.K. and found it perfect, then Carl Pollinger, the husband of America Olvera Pollinger, inspected it and told me that everything was O.K. and perfect and told us to go ahead with the act. America Olvera Pollinger always looked over all the equipment and everything after we got through and would give us the O.K. to go ahead. It was her instruction to me that her husband would O.K. everything before her act went on, and on September 12, 1937, and every other time the act went on, I followed her directions on that and on this date, September 12, 1937, I found everything in perfect condition—in good order, and then her husband inspected it and he found every-

(Deposition of William Matlock)

thing in perfect condition and he said everything is O.K.
[462]

“Q—Did you observe America Olvera Pollinger perform her act on the 12th of September, 1937?

“A—Yes.

“Q—Did you know Carl Pollinger?

“A—Yes.

“Q—When did you first meet him?

“A—In the spring of 1937.

“Q—In what connection?

“A—He was a performer in the Al G. Barnes show and he also directed his wife's rigging and waited on her every day when she went on. He would see that the guy lines were not crossed, that everything was perfect and everything level before she went on to do her act. I would say that he was sort of a director for his wife and looked after her act and interests and she always waited for his O.K. and he O.K.'d everything on the day that she fell.

“Q—Was he present at Anthony, Kansas, on September 12, 1937?

“A—Yes, he was.

“Q—Do you know what he was doing at that time?

“A—Yes, he had another feature act in the show and during his wife's act, he waited on her and attended her and held the web, which is the rope she climbs up on and comes down on. He stood there in the center of the ring and took her cloak off of her and directed me where to hold the net and told my crew where to hold the net. [463]

(Deposition of William Matlock)

"Q—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—He did not participate in putting up the rigging on that day, but he inspected and examined the rigging like he always did every day, and told me that everything was perfect and O.K.

"Q—What did he do in that connection?

"A—He examined and inspected the rigging and everything, and saw that everything was level, and he said: 'Everything is O.K.—go ahead with the act.'

"Q—Did he help America Olvera Pollinger perform her act that day?

"A—He waited and attended on her like he always did during every other day during the season, and he held the web and directed my crew how to hold the net, and where to hold the net, and I told my crew it was O.K. for them to hold the net according to his orders.

"Q—What did he do in that connection?

"A—He helped her in her act, and held the web by which she went up and he swung her and stopped by the web while she was in the trapeze.

"Q—Did you see America Olvera Pollinger on said date at or about the hour of—?

"Mr. Combs: Which we have established as 3:30 p. m. on that day, I believe.

"A—Yes, during the afternoon performance around 3 p. m. [464]

"Q—What was she doing?

"A—She was getting ready for her act and talking to me. She said that she was going to do a good act because

(Deposition of William Matlock)

some of the officials of Ringling Bros. was there sitting in the seats in front of her rigging. She asked me to point out Pat Valdo and show her where he was sitting. Pat Valdo is one of the big men from the Ringling show, and he has charge of hiring all the artists. She looked very nervous to me.

“Q—What occurred?

“A—She got up there and done her full act until nearly to the finish, and she fell from the last trick that she done. Her husband pulled her up to the trapeze, assisted by a rigging man. She was wearing a Spanish costume, and she swung the trapeze rope sideways and forward, balancing herself. She got into a high swing in which she was helped by her husband who was on the ground, holding the rope and directing the men underneath who were holding the net. As the swing slowed up, she knelt on the trapeze bar with her knees, with her hands free. She fell from the bar of the trapeze while she was making a bow to the audience with her right hand extended to the audience. All of a sudden she lost her balance and fell to the ground. Usually when she bowed, she grabbed the side of the trapeze with her left hand, and bowed with her right hand extended to the audience, but when she fell she had both hands free.

“Q—Relate in detail exactly what transpired with [465] relation to America Olvera Pollinger’s act on the trapeze.

“A—Her husband held the rope and with a rigging man pulled her up to the trapeze, where she was about to perform. She performed, doing her usual routine and tricks on a bar, and then she swung the trapeze both sideways and forward. While she was high in the air, and in a high swing, her husband on the ground assisted

(Deposition of William Matlock)

her by holding the rope, and he also told the rigging men where to hold the net, and how to follow her up. I told the rigging men to follow his orders because Miss America Olvera Pollinger told me to do as her husband said regarding the net. When the swing slowed up she knelt on the trapeze bar with her hands free and as she was at the front of the swing, she lost her balance and fell to the ground. She fell as the swing was out towards the audience. At the time she fell, she was swinging more farther than usual, and when she fell she fell beyond the net. Her husband was on the side where she swung, and she fell right in front of him, less than a few feet from the end of the net. She was unconscious after she hit the ground and said nothing. She was carried out to the doctor's tent and hurried away to the hospital. All of this happened in my presence.

"Q—State where you stood.

"A—I was standing near the center pole, near the ring, watching my crew and watching the act.

"Q—State exactly and in complete detail, everything you saw. [466]

"A—I saw her come out of the connection where the performers stand in the center, and get ready for their act. This connection is near the center of the tent. She was standing in the center, near the bandstand, waiting for her time to go on. When I looked at her she was very nervous, and looked like a person who is on pins and needles. The first thing she said to me was: 'Where's Pat Valdo sitting?' I pointed out Pat Valdo sitting in the center section of the grandstand. She walked over to the center of the center ring and her husband nodded to her that everything was O.K. She did her usual

(Deposition of William Matlock)

balancing and routine tricks on the bar, and as I explained before, she fell just towards the finish. I have already explained in detail what happened.

“Q—Who else was there?

“A—The man that directs the show stood right near me at the time, a few feet away, and a number of other people.

“Q—Give their names.

“A—Joe Horton, Thomas Parsons, Carl Pollinger, Phillip La Bay, Chandler Miller, Robert Thornton. Pat Valdo was in the audience, and Mr. Sylvester Cronin. There were others present, but I don't remember their names.

“Q—When America Olvera Pollinger fell, what occurred?

“A—I ran towards her and helped pick her up. She was unconscious and said nothing. I directed a few property men to pick her up and rush right to the doctor's tent, and they followed my directions. [467]

“Q—Was anything said by America Olvera Pollinger at that time?

“A—No, absolutely nothing; she appeared to be unconscious.

“Q—If so, state who was present.”

Mr. Combs: I guess if agreeable with counsel we can skip to 54.

Mr. Marcus: All right.

“Q—Now you may relate exactly what was said by you and what was said by America Olvera Pollinger, and

(Deposition of William Matlock)

what was said by Carl Pollinger and any other persons there in the presence of America Olvera Pollinger.

"A—I directed several property men to rush her to the doctor's tent. No one said anything, and everybody was busy trying to get her to the doctor as soon as possible.

"Q—State the names of the individuals in so far as you can remember them, who helped in the erection of America Olvera Pollinger's rigging on September 12, 1937.

"A—My rigging crew, Phillips La Bay, Thomas Parsons, and Joe Horton, and others whose names I do not remember.

"Q—Do you know whether or not the America Olvera Pollinger rigging was inspected after erected on September 12, 1937, prior to her going on in her act?

"A—Yes.

"Q—Who inspected it?

"A—I inspected it, and then she and her husband [468] inspected it, and she looked it over to see if the bar was level.

"Q—What was done in that connection?

"A—She signaled to me to level off her rigging, and then when I did so, she said: 'Everything is O. K.'

"Q—Can you state what the condition of the rigging was at that time?

"A—It was perfect and leveled in fine shape.

"Q—Relate exactly how it looked when it was in the air.

"A—It was level and in perfect condition, as it had been in the past.

(Deposition of William Matlock)

“Q—Describe in detail the position of each guy rope, hook, eye, clevis, cable, wire, cross bar, or other portion of the equipment.

“A—The trapeze is a bar of solid steel with two stars on the end of it to weight it down. The bar is $\frac{7}{8}$ of an inch thick. The cables are hooked onto each corner of the crane bar in order to guy it out to the ground; there are four cables $\frac{3}{8}$ of an inch thick and each cable is 30 feet long. The top of the crane bar has five rings, two to hook up the trapeze and two to raise it off the ground and one ring to pull the girl up to the trapeze. The trapeze hooks into two sister hooks or marine hooks. The marine hooks or sister hooks are in the form of a figure eight and once you shut them, the weight of the trapeze keeps it locked. This crane bar has four eyes, two eyes hook to the right and two [469] eyes hook to the left of the main falls. The fall consists of a rope—a double block and single block: the fall is from 45 to 50 feet long and it can be raised up and down; the rope that goes into the block is $\frac{3}{4}$ of an inch thick. There are two falls which hook onto the bail rings and the rigging. The upper block hooks to the bail ring and the lower block hooks onto the crane bar. The bail rings are made out of steel and are $1\frac{1}{2}$ inch in diameter, two hooks hook on the bail ring which consists of blocks and falls, which as I said before, consists of a double block and a single block. The cables which hold the trapeze up to the crane bar are 12 feet long and each cable has a sister hook which is connected to the crane bar. The crane bar is $5\frac{1}{2}$ feet long with U-shaped rings commonly called a clevis which are connected right into the crane bar and there is a foot loop to pull the artist up to the rigging. The two main falls hook into the bail ring.

(Deposition of William Matlock)

one to the right and one to the left side of the center pole that holds the rigging up. There are four stakes one on each corner. There is a $\frac{1}{2}$ inch becket with an eye spliced in the rope and the blocks are hooked right into it. The blocks keep the rigging level and guy it out very quickly.

"Q—Is that a full and complete description of the exact condition of said equipment immediately after it was put in place and before America Olvera Pollinger took her place upon the trapeze? [470]

"A—Yes.

"Q—What occurred after she took her place on the trapeze?

"A—She performed her act and as she was making her bow she fell from the trapeze.

"Q—Relate in detail.

"A—She was doing her routine of tricks nearly to the finish of her act and she was balancing with her hands free when she fell. Her husband was holding the rope and was watching her act.

"Q—Did you see America Olvera Pollinger fall?

"A—Yes.

"Q—When did she fall?

"A—Towards the finish of her act while she was making a bow she fell.

"Q—Describe what you observed in connection therewith.

"A—She was doing her act and at the finish and as she was bowing to the audience with her right hand extended to the audience she fell.

"Q—How did she fall?

"A—She fell head first.

(Deposition of William Matlock)

“Q—Where did she fall?

“A—Inside of the center ring near the edge.

“Q—Was there a net underneath the trapeze?

“A—Yes.

“Q—Describe said net. [471]

“A—It is made out of canvas with rope handles to hold it tight so the men can hold it firmly.

“Q—How many men held on to the same?

“A—About ten men.

“Q—State as many of their names as you can.

“A—Thomas Parsons, Joe Horton, Phillip La Bay and a man named Whitey and I don't remember the names of the other men who held the net.

“Q—How many in all were there on the net?

“A—About ten men.

“Q—Where was the net located when Mrs. Pollinger fell?

“A—Right underneath her and directly under the crane bar. She hit the edge of the net when she fell and that broke her fall.

“Q—Did you look at the rigging after she fell?

“A—Yes, and everything was O.K.—sister hooks and all that.

“Q—If so, state what you observed in connection therewith.

“A—The trapeze bar and the crane bar were in the same condition as when she went up on it; it was absolutely level and everything was perfect, the same as it always was.

(Deposition of William Matlock)

"Q—State the exact condition, position and location, of every guy rope, cable, hook, eye, cross bar, wire, and portion of said equipment after Mrs. Pollinger fell.

"A—The guy lines were all guyed out right and the [472] rigging was level and perfect and while she was working, it did not give at all and the rigging was firm all the time during her act. I already explained this in detail in answer to question No. 61 and there was no change after she fell. The minute she fell, Mr. Cronin, the manager of the circus, came running out of the seats and took a look at the rigging."

Mr. Marcus: That part with regard to what Mr. Cronin may have found out—

Mr. Combs: It is stipulated that it may be stricken at this time, and the jury instructed to disregard it.

The Court: So ordered. The jury will disregard it.

"Q—Did you observe whether or not she was injured?

"A—She appeared dazed and unconscious and I didn't notice how badly she was hurt.

"Q—Relate the times when you saw America Olvera Pollinger perform on her trapeze.

"A—Practically every time she performed, during the 1937 season, I was right there.

"Q—Relate the times when you observed the rigging upon which she performed.

"A—Every day she performed during the 1937 season.

"Q—Do you know whether or not it was rigging supplied by her?

"A—Yes, it was her own rigging.

(Deposition of William Matlock)

“Q—If so, state.

“A—Yes, it was supplied by her and was her own rigging. [473]

“Q—Have you had occasion to observe the use of rigging for other trapeze acts?

“A—Yes.

“Q—State what experience you had in observing and examining equipment or rigging used for trapeze acts.

“A—I have been a rigger and superintendent of properties for circuses for over thirty years. From 1912 to the present time, I have been superintendent of properties for circuses and prior to that time, I have been a rigger for circuses, I have been employed by Barnum & Bailey, Hagenbeck-Wallace, London Hippodrome, Sells-Floto and Al G. Barnes. I have also built riggings myself and have owned my own rigging which I used in vaudeville in my own acts.

“Q—Describe the equipment used by America Olvera Pollinger during the times you have stated you observed her using the same.

“A—She always used the same equipment—the only thing she ever changed was her wardrobe. I have already explained this in detail in answer to No. 61. She either stood or sat on the trapeze bar.

“Q—Are you familiar with the marine hooks by which the cable extending from the upper cross bar to the lower cross bar upon which America Olvera Pollinger performed?

“A—Yes.

(Deposition of William Matlock)

"Q—Describe the same.

"A—The hooks are like a figure eight and they open up [474] and after the weight of the trapeze goes on them, they are closed—locked, as I have explained before.

"Q—Are you familiar with the attachment of guy wires to the upper cross bar?

"A—Yes.

"Q—Describe the same.

"A—Hooked to the crane bar on each corner. There are four of them—two on each side. The cables are about $\frac{1}{4}$ to $\frac{3}{8}$ of an inch thick and are about 30 feet long.

"Q—How long did it take for America Olvera Pollinger to perform her act?

"A—Between 5 and 6 minutes.

"CROSS INTERROGATORIES

(Interrogatories read by Mr. Marcus; answers read by Mr. Corkery):

"Q—Is it not a fact that your salary was paid by the Al G. Barnes show?

"A—Yes.

"Q—How much was your salary per month?

"A—Well, it was \$40.00 per week plus a \$100.00 bonus, payable at the end of the circus season, plus board, room, transportation, medical aid and the necessary uniform used in attending the shows.

"Q—Were you paid in cash or by check?

"A—By check.

(Deposition of William Matlock)

“Q—Please name the person who paid your salary.
[475]

“A—Mr. Theodore Forestal.

“Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes show?

“A—I supervised the erection of the rigging of the trapeze performers in the Barnes show.

“Q—Is it not a fact that you erected the rigging of all of the trapeze performers in the Barnes show?

“A—I supervised the erecting.

“Q—Is it not a fact that the erection of the rigging was the work for which you were employed by the Barnes show?

“A—I was employed by the Barnes show to act as superintendent of property which included supervision of the rigging and the actor's equipment.

“Q—Is it not a fact that on September 12, 1937 Howard Mentz was suffering from the result of an accident to his foot and that his foot was in a cast?

“A—Yes.

“Q—Is it not a fact that many employees of the Barnes show erected the rigging of the different performers prior to September 12, 1937?

“A—No. We had the same crew all season and every man on the crew was an expert rigging man and had had several years experience in the circus business.

(Deposition of William Matlock)

"Q—Name the different persons who erected the rigging.

"A—Thomas Parsons, Philip La Bay, Joe Horton, Chandler [476] Miller, Howard Mentz and several others whose names I don't recall right now.

"Q—Who supervised the erection of Miss Olvera's rigging on September 12, 1937?

"A—I supervised it and then it was inspected by Miss Olvera's husband after I got through and then she, herself, look over it.

"Q—When did you first meet Miss America Olvera?

"A—In the spring of 1937.

"Q—When did you speak to Miss Olvera for the first time on September 12, 1937, the date of the accident?

"A—I spoke to her just as she entered the circus tent near the bandstand.

"Q—When and where did this conversation take place and name the persons present. Relate the conversation.

"A—She spoke to me near the bandstand in the center of the circus tent, near the center ring. The conversation took place between Miss America Olvera and myself. There was no one within hearing distance. She said, 'Blackie, where is Pat Valdo and the rest of the Ringling men sitting?' I said in the center section of the grandstand seats and she said, 'I want to do a good act today because Pat Valdo is sitting in the center watching me.' She then asked me how is the rigging and I said everything is O.K. level and perfect and that I had made a careful inspection of it. She looked it over and then said to me, 'Everything is O.K. and fine.' [477] All the time she spoke to me, she appeared to be very nervous and kept her eyes on Pat Valdo.

(Deposition of William Matlock)

"Q—Where were you during the time that Miss Olvera was performing her act on September 12, 1937?

"A—In the center of the tent and near the center ring where Miss Olvera was performing.

"Q—Is it not a fact that you received tips from Miss Olvera each week?

"A—At the end of each week, she would say, 'Thank you for taking good care of me' and she would give me a tip.

"Q—State how much you received.

"A—On an average of about \$3.00 a week.

"Q—Is it not a fact that you were employed by the Barnes show and assisted in erecting the rigging of all of the acts in the circus?

"A—I was employed by the Barnes show and superintended the erection of the rigging of the entire show.

"Q—Name the acts in which you supervised the erection of the rigging in the Barnes show.

"A—I supervised the erecting of all the acts.

"Q—When and where were you first employed by the Barnes show?

"A—In the spring of 1935 at Los Angeles, California.

"Q—Describe in detail the manner in which Miss America Olvera's rigging was erected.

"A—The same thing I described before when that question [478] was asked. There is only one way to put up a trapeze act and that is the way I described in answer to the previous question on that when I told in detail the position and erection of her equipment.

(Deposition of William Matlock)

"Q—Where were you standing at the time that the act of Miss Olvera began?

"A—Near the center pole, near the center of the tent and near the center ring where Miss Olvera was performing.

"Q—How many other acts were in progress at the circus at the time?

"A—Two other acts but I was stationed in the center watching her act which was the feature act. My assistants were watching the other two acts.

"Q—Relate all that you saw of Miss Olvera's act on September 12, 1937.

"A—I saw her act from the beginning to the end and I saw her fall.

"Q—Where was Howard Mentz during the performance of America Olvera's act on September 12, 1937?

"A—He was on crutches and I don't recall exactly where he was but I do know he was around somewhere in the circus tent.

"Q—Relate in detail the description of the other acts.

"A—There were two trapeze acts, one in each end ring and in connection with these trapeze acts, there were some swing ladders used. The other acts had been completely [479] finished and Miss Olvera finished her act alone and was the featured act. The other two acts having finished completely had gone out of the circus tent at the time she fell.

"Q—Did you see America Olvera fall on September 12, 1937?

"A—Yes.

(Deposition of William Matlock)

"Q—Was she through with her act?

"A—She was just finishing her act.

"Q—What trick was she doing when the accident occurred?

"A—She was balancing herself on her knees while swinging on the trapeze bar.

"Q—Who picked Miss Olvera up from the ground after she fell?

"A—I and three of my property men picked her up.

"Q—Isn't it a fact that after she fell she was screaming and made the following remark: 'Blackie, look how crooked the trapeze is!'

"A—No, she was unconscious and said nothing. She never made any complaints to me about the rigging or anything else connected with the equipment used in her act; and she always said, 'Blackie, everything is good and O.K.' and she would praise my work each week and give me a tip.

"Q—Did you see America Olvera's rigging after she fell?

"A—Yes.

"Q—Was there a net supplied for Miss Olvera by the Barnes Show? [480]

"A—No, she always used her own net; she told me to use it and that she didn't want any other net used.

"Q—How many men held the net? Name them.

"A—About ten men. Their names were Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Howard Mentz, a man they called Whitey and the other names I can't recall right now.

(Deposition of William Matlock)

"Q—Did you ever hold the net?

"A—No, I always supervised the holding of the net under orders from her husband; she told me to take orders from her husband and he would direct the handling of the net.

"Q—Was there a safety net provided on September 12, 1937, for Miss Olvera?

"A—Yes, there was.

"Q—Name the men who held the net on that day.

"A—Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Whitey and some others whose names I don't recall just now.

"Q—Did Miss America Olvera ever tell you on occasions prior to the date of the accident and on the day of the accident in the presence of Mickey Grey that the apparatus was not being set up properly?

"A—No, she always told me everything was O.K. and that the apparatus was always being set up properly. The season had been on for six months at the time that the accident occurred and everything was always in good order and she [481] complimented and praised me for my work in having things in such good order. She never complained but on the contrary always praised me for the good work and told me that the tip she was giving me was appreciation for the way in which I took care of her property and took care of her interests and supervised the putting up of her rigging.

"Q—Where were the men who were holding the net standing at the time that Miss Olvera fell on September 12, 1937?

"A—Right underneath the crane bar and right underneath her. Her husband was standing on the side of the

(Deposition of William Matlock)

net near the men and holding the rope so in case anything happened, he could hand her the rope quickly.”

Mr. Combs: That was stricken, your Honor.

The Court: That may go out.

Mr. Marcus: Then go on to question 40.

“Q—Describe where Miss Olvera fell?

“A—She fell inside of the ring on the edge of the net and the net broke her fall.

“Q—How wide is the ring in which she performed?

“A—It is forty feet in diameter.

“Q—Was the net being held within the ring?

“A—Yes.

“Q—Is it not a fact that she was screaming after she was out of the ring, already hurt, she called you and said to you, ‘Blackie, look at the trapeze how crooked it is!}]’ and [482] you immediately looked up and said ‘Yes, I see it.’

“A—No. She was unconscious and said nothing, She always praised my work and never at any time made any complaint whatsoever concerning anything but always praised the way I took care of her interests and supervised the erection of her rigging and everything connected with her act.

“Q—Did you always during the entire season supervise the erection of Miss Olvera’s apparatus?

“A—I did.

“Q—Did Miss Olvera ever complain to you regarding the way in which the apparatus was set up?

“A—No, she always praised me and the manner in which I performed my duties.

(Deposition of William Matlock)

"Q—Is it not a fact that Miss Olvera many times requested you to tell the boys to be more careful about the erection of the rigging?

"A—No, she always told me she was well pleased and many times said, 'Blackie, your work is fine and good' or she would speak to me in Spanish and explain to me how pleased she was with everything and the way I and my crew handled her rigging.

"Q—Did you help to erect the rigging on September 12, 1937, or merely supervise the erection?

"A—I supervised the erection and then inspected the erection of the rigging and after I inspected everything, her husband inspected it and then after he O.K.'d it, she [483] would look over everything.

"Q—Is it not a fact that on many occasions Miss Olvera complained to you about the few number of men holding the net?

"A—No, she never complained to me about the few number of men holding the net or anything else. There was never a shortage of men holding the net and the net was always held by a full crew and held firmly.

"Q—And is it not a fact that as a result of said complaint you yourself assisted in holding the net?

"A—No, I never held the net because I always had plenty of men to hold the net and all I did was to direct and supervise the holding of it.

"Q—Describe in detail Miss Olvera's equipment.

"A—It is the same equipment which I have already described in detail in the other question.

"Q—What trick was Miss Olvera performing when she fell?

"A—She was on her knees balancing herself on the trapeze bar and was bowing to the audience when she fell;

(Deposition of William Matlock)

usually she held one bar with her left hand and bowed with her right but this time she had both her hands free and was bowing with her right hand extended.

“Q—During the season was it the same crew that fixed the rigging? If not, how many changes were made and who were they?

“A—I had an experienced crew of rigging men who had [484] many years of experience and no changes were necessary; my crew stuck with me. There were many rigging jobs in a circus that required greater skill than her rigging and we never had any complaints from any one or any trouble of any kind. Everyone was satisfied with the way I did the work and praised me and my crew for the way things were going.

“Q—Did Karl Pollinger have an act on his own?

“A—Yes.

“Q—How long did it take for Pollinger to put his apparatus together?

“A—About one hour.

“Q—Is it not a fact that Karl Pollinger was continuously busy preparing his own equipment?

“A—No, he had a large crew to attend to his equipment and he would always assist and aid his wife in the performance of her act; he was always present at the time she performed and he wouldn't let anybody hold the web outside of himself. He never had any trouble in getting away to assist his wife because her act only consumed about five minutes.

“Q—Is it not a fact that Karl Pollinger asked you to have men assist him in securing his equipment?

“A—No.

“Q—When did you last see Mr. Karl Pollinger?

(Deposition of William Matlock)

"A—In October, 1937, at the conclusion of the circus season. [485]

"Q—Is it not a fact that you had a conversation with Mr. Karl Pollinger in Hollywood, California, during the 1938 season in the presence of Blackie Wallace, Howard Mentz and 'Ringling'?

"A—No.

"Q—Relate the conversation.

"A—I never had such a conversation.

"Q—Did you ever notice on any occasion that the rigging was not erected properly?

"A—No, the rigging was always put up right and after over years of experience, I know when things are right or wrong. I have never had a single accident in my entire circus career.

"Q—Is is not a fact that in two or three occasions Miss Olvera went up on her trapeze but was unable to do her act, and came down because her trapeze was not properly set up?

"A—No, she always completed her act. She never complained about the trapeze not being properly set up and it was always set up in the best possible manner—in first class condition.

"Q—Is it not a fact that Mickey Grey brought you into the show business as a rigger?

"A—I don't know anyone by the name of Mickey Grey, but I do know a property man by the name of Mickey Graves and that man did bring me into the show business as a rigger." [486]

Mr. Combs: That is all. Our next witness, your Honor, is Chandler Miller in person.

(The court after admonishing the jury took a short recess.)

CHANDLER P. MILLER,

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Combs: What is your name?

A. Chandler P. Miller.

Q. Are you the individual sometimes known as Ringling?

A. I have been known by that name around the circuses, yes, sir.

Q. Are you any relation to the Ringling family?

A. No, sir, I am not.

Q. What is the derivation of that nickname?

A. I was a pretty young lad when I first started in the show business. The first two years of my show experience was with the Ringling shows, and then with other shows. They used to say "That is a Ringling man," and they called me "Ringling."

Q. That was where you got your nickname?

A. Yes.

Q. Where do you reside? [487]

A. No. 8 Essex Street, New York.

Q. What is your present occupation?

A. I am a member of the protective force at the Federal Shipbuilding dock at New Jersey.

Q. Have you ever been in the show business?

A. Yes, sir, quite a long time.

Q. Will you state how long you have been engaged in that occupation? A. I believe about 18 years.

Q. That was prior to your going with this concern in New Jersey? A. That's right.

(Testimony of Chandler P. Miller)

Q. When did you discontinue the show business?

A. At the end of the 1942 season, with the Ringling Bros. Barnum & Bailey Circus.

Q. At that time you took this other job?

A. Shortly after that, yes, sir.

Q. Had you been engaged in the show business without cessation prior to that time?

A. There were intervals in a period of approximately a year or two I was out doing something else. I was in the Army seven years during the other war; also, I worked for an oil company a while, along in the late '20s. I can give you the names of the circuses, in case you would like to have them.

Q. Will you, please, and if possible, the capacity you [488] worked for them in.

A. 1910 and 1912 I was canvas man with the Ringling Bros. Circus. In 1913 I was a rigging man with the Hagenbeck-Wallace Circus; in 1920 I was boss property man with the First Division Military Circus. Then from 1927 to 1932, inclusive, I was a rigging man, two years as an assistant boss property man for the other preceding years, with the Sells-Floto Circus; in 1934 I was employed at the Chicago World's Fair, doing certain kinds of rigging work in connection with the circus they had there in that exposition. In 1935 I was head rigging man with Cole Bros. Circus. In 1936, 1937 and 1938 season, boss property man with the Al G. Barnes Circus.

Q. Were you present during the season when America Olvera fell from her trapeze?

A. I was.

Q. Were you present in the circus tent on that day?

A. Yes.

(Testimony of Chandler P. Miller)

Q. Had you been boss property man that entire season from March to September of that year?

A. Yes, I was.

Q. What were your duties in that connection?

A. I supervised first in the morning the erection of the dressing rooms, the unloading of certain trunks and placing them in the dressing rooms, and then when we got the dressing rooms up the big top would be raised. We would have [489] certain main falls, which we would have to see placed on the bale ring in the big top.

Q. What is the fall?

A. The main fall, block and fall, or double block or single,—the blocks are hung up on the bale ring. The main ring, around the center pole, is about 33 inches in diameter, made out of 3-inch gauge steel.

Q. The main center pole is about 33 inches in diameter?

A. No, the center pole is not that large in diameter. The bale ring around the pole is that large. The center pole is approximately 15 or 16 inches in diameter.

Q. The middle ring, where Miss Olvera performed, was, I take it, located between these center poles?

A. Between No. 2 and No. 3 center poles.

Q. How many center poles were there in the Barnes circus?

A. Four center poles in the Barnes circus.

Q. How far apart were the center poles, being 2 and 3, which you referred to? A. 50 feet.

Q. Below them was a ring?

A. Yes, sir, the ring was below the two center poles.

(Testimony of Chandler P. Miller)

Q. Lying on the ground?

A. The ring was about 39 feet in diameter, up midway between the two poles. In other words, the same interval between the right side of the ring, and the same interval on the left side of the ring, between these poles. [490]

Q. How wide was the ring?

A. 38 feet, 8 inches, to be exact, was the measurement of the inside ring.

Q. The width of the ring itself, I mean to say—the width of the material constituting the ring.

A. Do you mean the outside circumference?

Q. The outside circumference.

A. About 40 feet.

Q. Within about a foot of the width of the ring itself?

A. Yes, almost that.

Q. How high? A. 12 inches high.

Q. Then you state that at the top of each of these No. 2 and No. 3 center poles was a big bale ring, about 36 inches in diameter? A. Yes, sir.

Q. How far from the canvas was the bale ring?

A. The canvas is lashed to the bale ring. The bale ring from the ground is 43 feet, when pulled into position, that is, after the canvas is raised every day.

Q. When Miss Olvera's trapeze was pulled up into the tent, I take it—will you explain to the jury what was done in that connection?

A. Well, as soon as the big top was erected in the morning, and of course, it was pulled up, as I have just explained, 43 feet, and the blocks and falls on the center [491] pole, on this bale ring, the other rigging was placed.

(Testimony of Chandler P. Miller)

I mean by that, that the other falls were hooked on the bale ring that went up with the big tent, and the big tent was guyed out, and the rigging could be attached to the main falls underneath the canvas. They were pulled up by lines running down from each of the bale rings.

Q. These falls are block and tackle, with a hook on it, is that right? A. Yes.

Q. So when this trapeze equipment is hooked on, it is hooked on from one hook from No. 2 center pole and one hook from No. 3 center pole, and the rigging men just pull the pulley blocks and it raises the trapeze?

A. Yes.

Q. The trapeze raises in between the two center poles?

A. Yes, sir.

Q. How far up was the crane bar of Miss Olvera's trapeze raised on the 12th of September, if you know?

A. Yes, sir, it was raised about 34 or 35 feet high.

Q. Will you explain to the jury the approximate manner in which the crane bar hung after it was raised?

A. Yes, sir.

Q. Can you do better by using the blackboard?

A. I can draw a diagram on the board, if necessary.

Mr. Marcus: We have a picture of it, your Honor.

The Witness: I might explain to the court that I am not [492] an artist.

Mr. Marcus: Mr. Combs, will you approach the bench please?

(Discussion off the record.)

(Testimony of Chandler P. Miller)

The Court: I believe that the witness was about to make a statement that he was not an artist. So understood.

A. Yes. I might draw a simple type of perspective of it.

The Court: Go ahead.

A. Let this represent the center pole here. This is the bale ring on this pole. This is one of the center poles. This will be one of the other center poles. You will have to imagine yourself inside of a circus tent, looking toward the grandstand seats, because this, as I am doing it, is from the back side of the show. In other words, if you were standing at the bandstand, looking toward the audience; I am putting little things here to represent the main falls which come from the bale ring, running down, and tied off on a pin on the center pole. The excess rope is coiled around here. This is the crane bar of the rigging, approximately 8 feet below the top of the canvas. Her rigging is in the air, and has a small trapeze hanging down. The sides, I believe, are about 12 feet. I would have to be an artist to draw the stars on the side of it. Roughly, that is what the position of that is. The ring is here. You will have to imagine yourself looking at it back in this position, 38 feet across, 38 feet 8 inches. The guy lines run down the [493] outer poles along here. About four feet from the ring there is a stake driven. There is a little block and tackle down here, which is used on each one of these guy lines to take the slack up by the rigger when he guys out the rigging. There is another guy line running to this stake, with a little block and fall. These are very crude drawings.

(Testimony of Chandler P. Miller)

Mr. Marcus: Your Honor, can Miss Olvera take a seat over here, during this drawing, and be permitted to see it?

The Court: Oh, yes.

A. There is an ascension rope, which is on this side. In other words, they call it a pull-up rope, used to pull the artist up in the rigging to do her act.

Q. By Mr. Marcus: Now, you are putting a dimension on there. I take it to be the distance from the trapeze bar itself to the ground. How much is that?

A. 22 feet.

The Court: Mr. Combs, may I suggest to Mr. Miller, I think we know these distances pretty well, by other testimony, and his testimony is substantially the same. In order to keep from causing confusion with all these other lines, I would suggest that these different lines be marked out. Does that meet with your approval?

Mr. Combs: Yes. I would like to have the distance from the top of the tent.

Mr. Marcus: Miss Olvera's testimony was, and so was Mr. Pollinger's, that,—and two other witnesses—that the [494] distance was four feet; not eight feet.

The Court: His testimony is that it was eight feet?

Mr. Combs: This witness says eight feet.

Q. Now, Mr. Miller, I take it that you are familiar with the erection of the equipment in this tent, are you not? A. Yes.

Q. You were on the day of the 12th of September, 1937? A. Yes.

The Court: (To Mr. Marcus): I don't believe Miss Olvera should discuss this matter with you in a voice that

(Testimony of Chandler P. Miller)

will be disturbing. She can sit right there, and she will have ample opportunity to advise you of anything she desires about it, but it is better, I think, to refrain from discussing it at the present time. Will you read the question and answer, Mr. Dewing?

(Question and answer read by the reporter.)

Q. By Mr. Combs: Did you have anything to do with the erection of this particular equipment on that day?

A. Yes, sir, I had charge of the men that drove all of these stakes, and also I saw that each rigging was put up in the air at the proper place, and the equipment was hung in proper position.

Q. You did so on this particular day?

A. Yes, sir.

Q. That was your customary work with the circus?

A. That was about every day routine. [495]

Q. Was that routine followed on the 12th of September in the same manner that it had theretofore been followed since March of that year? A. Yes.

Q. At each stop the circus made?

A. That's right.

Q. Was there any difference in the manner in which this rigging was erected on the day involved in this accident than on any day theretofore?

A. No, sir, there was not.

Q. I take it there was a net underneath the rigging, was there not?

A. Yes, sir, there was a net, I believe, at the final part of Miss Olvera's show; but it was not during the whole number.

(Testimony of Chandler P. Miller)

Q. That net was approximately how large, held by how many men?

A. Well, I would say it was 12 feet square, and that it was held by eight men.

Q. Where was it held with relation to the trapeze?

A. Directly in the center of this lower bar, in the center of this ring.

Q. Was there any particular reason why it was held there?

A. Yes, sir, because we were instructed to hold it there, because in case it was necessary to move it we would have a less amount of ground to cover, going in any direction. [496] Another thing was, the artist wanted the net quiet while she was doing her number, and did not want to be disturbed by any object moving on the ground below her, because she was doing her balancing act, and it detracted her attention, so we were told.

Mr. Combs: I move to strike that out as calling for the witness' conclusion, and hearsay.

The Court: It may go out, and the jury will be instructed to disregard it.

Mr. Combs: It is stipulated the whole answer may go out, and the jury instructed to disregard it.

Q. Mr. Miller, was that net held and manipulated in the same manner, on the day of the 12th of September, 1937, as it had been theretofore since March of that year?

A. Yes, sir.

Q. No difference, is that right?

A. That's right.

(Testimony of Chandler P. Miller)

Q. Will you relate, making reference to the diagram, the exact manner in which this trapeze was put in place on the 12th of September?

A. In the morning—

Mr. Marcus: Will you read the question again?

(Question read by the reporter.)

Mr. Marcus: I object to it, unless the time is set for it more particularly, your Honor.

Q. By Mr. Combs: You may first start with when it was put [497] in place.

A. This entire trapeze was already hung in the morning before the doors opened and the people ever came in the circus tent, but it was pulled off to one side; in other words, this side was slacked off, and it was pulled over here out of the center of the ring. In other words, it was pulled clear over here toward the center pole. The guy lines were tied on the other pole, by means of a little block and pulley, so that it would be out of the way for the other acts which were performed before this number was on the program. That was the routine that was followed the entire season; and before Miss Olvera's time to go to work, the rigging was pulled up into place, the same as you see it now, guyed out to there with four guy lines.

Q. How was that done? Explain that in detail.

A. One man would slack off, and the rigger on this pole would untie it, and slack off to a marked position on the rope, which was done by sticking a pin where that point was on the rope, and when the rope comes to the point where the mark is, where the rigging goes—it is done that way, because it saves an awful lot of time, and you don't have too much time in doing this job. After it is in place,

(Testimony of Chandler P. Miller)

where you see it, it is tied off, and the rigging man gets hold of the guy line that goes to these stakes,—

Mr. Marcus: Mr. Miller, it is difficult for me to see. So will you stand to the side, please? [498]

A. There being a rigging man at each stake, and there is a little block and fall, and whoever is guying out the rigging, stands back in this position, back of the rigging somewhere outside of the ring, and he can see where this bar is level here, or if it is too low—

The Court: At that point is the top of the crane bar?

A. That is the top of the crane bar.

The Court: For the purpose of the record.

A. The person who runs up the rigging, we will call it, stands here, and directs each one of the riggers with the guy line how much to pull, so he can tell very easily, when the rigging is level. When the top of the crane bar is level, the bottom of the bar here will be level, providing it is hanging in its correct position.

Q. By Mr. Combs: In the particular day in question, did you supervise or observe the guying out of this equipment?

A. I was here watching it being done.

Q. Did you direct the leveling off of the bar, and so forth?

A. It was not for me to do so, no. Mr. Pollinger was doing that.

Mr. Marcus: I object to that as a conclusion, and volunteered.

The Court: It will go out.

(Testimony of Chandler P. Miller)

Q. By Mr. Combs: I will ask you who supervised or observed the guying out of the rigging at that time and place? [499]

Mr. Marcus: That is objected to as calling for the conclusion of the witness, and hearsay.

The Court: It might be calling for his conclusion.

Mr. Combs: If it is the use of the word "supervised," your Honor, I am willing that it go out, and I will try to find another word for it.

Q. Who, on this particular day in question, did the directing of the riggers at these blocks and falls, when the guying out was done?

Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion.

Mr. Marcus: I suggest, your Honor, that the question is leading and suggestive.

The Court: It has been withdrawn.

Q. By Mr. Combs: What was Mr. Pollinger doing at this particular time on the day mentioned?

The Court: Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty.

A. Well, he was indicating which guy line to pull on by pointing with his finger to a certain rigging man out at a certain stake. He would indicate in this manner.

Q. By Mr. Combs: That is, pointing his finger at the guy line? [500]

A. Yes.

(Testimony of Chandler P. Miller)

The Court: Where was he standing, when he pointed his finger? A. Back here.

Q. On the outside of the ring? A. Yes.

Mr. Combs: Indicating a point between the ring and the bandstand? A. Yes, sir.

Q. How long did he remain there in that position?

A. I don't think over a minute or a minute and a half, possibly.

Q. Did he give any signal or make any statement when he departed from that position?

Mr. Marcus: I object to that as assuming facts not in evidence, and leading and suggestive.

Mr. Combs: I don't think so, your Honor. It calls for a yes or no answer.

The Court: Read the question, please.

(Question read by the reporter.)

The Court: You may answer yes or no. Overruled.

A. No, sir.

Q. By Mr. Combs: He just departed, is that right?

Mr. Marcus: I object to that as assuming facts not in evidence.

The Court: Overruled. You may answer. Did you see him. [501] walk away. A. Yes, sir.

Q. By Mr. Combs: Prior to that had he done anything with his hands in relation to the process of guying out these lines?

Mr. Marcus: Your Honor, I suggest that is absolutely leading and suggestive.

The Court: I think it is suggestive, and I think that it has been asked and answered.

(Testimony of Chandler P. Miller)

Mr. Combs: I think it has been asked and answered. I will withdraw it.

Q. How long did Mr. Pollinger follow that course of pointing to these respective blocks and falls when the guying out was being done?

A. Do you mean the length of time?

Q. Yes, about how long?

A. As I stated, probably a minute or a minute and a half.

Q. Had he been doing that sort of thing, that is to say, pointing at the riggers guying out these lines, prior to this day?

A. Yes, sir.

Q. Was that a regular thing for him to do in connection with Mrs. Pollinger's act?

A. I couldn't say that was regular. I had seen him do it several times.

Q. Was there any signal or prearranged sign in any way [502] when the guying out was completed that was indicated to the men at the blocks and falls?

A. Yes, sir, there was.

Q. What was that sign?

A. Well, he would merely give an indication like that, which would indicate that the rigging was level and in order, to work on.

Q. That was a motion with his hands?

A. Yes, sir.

Q. Did he do so on that occasion?

A. Yes, sir.

Q. When did he do that?

A. Well, at the completion of the guying out of the rigging.

(Testimony of Chandler P. Miller)

Q. Was that immediately before he walked away?

A. Yes, sir.

Q. What did Mr. Pollinger and Mrs. Pollinger do thereafter?

A. Well, Mr. Pollinger walked back in this position, which was alongside of the bandstand, and Miss America came in this way, and he walked into the ring with her.

Q. Then what occurred?

A. Mr. Pollinger and one of the property men pulled Mrs. Pollinger up on the rigging by means of this ascension rope.

Q. Then what did Mr. Pollinger do?

A. He held the rope out to one side. [503]

Q. What did she do?

A. She started to go through the routine of her act.

Q. Relate to the court what you saw from then on, to the point where she fell.

The Court: Just take the witness stand now.

Mr. Combs: Will you read the last question, Mr. Dewing?

(Question read by the reporter.)

A. I saw Miss Olvera go in the rigging and start doing the routine of her number, the first part of which, I believe, was standing, and so forth, and balancing in some manner; and I had work to do in the next ring, and wasn't there during the first part of her act.

Q. At what part of her act did you return?

A. At the conclusion of the second and third rings. The act ends there just before Miss Olvera did the final part of her number, and I was engaged there at that time.

(Testimony of Chandler P. Miller)

Q. That is to say, you came back as soon as the other two acts terminated? A. Yes, sir.

Q. What was Miss Olvera doing at that time?

A. Miss Olvera was being swung, I believe, by her husband.

Mr. Marcus: I move that "I believe" be stricken.

The Court: I think he simply means that is his recollection.

A. My recollection; that is right. [504]

Q. By Mr. Combs: At that time you observed her again, is that right? A. Yes, sir.

Q. Did you observe her continuously from then until the time she fell? A. Yes, sir.

Q. Now relate to the court and jury what occurred.

A. She was swung a couple of times by her husband. In this swinging position she was seated on the bar, and the rope was pulled, swinging her forward a couple of times, and then she would take her position on her knees, and place a handkerchief on the lower bar. I saw her get on her knees, place the handkerchief on the bar, and the trapeze was gradually slowing down during this time; and in her attempt to pick up the handkerchief with her teeth she came out of the trapeze forward and struck the ground in front of the net.

Q. About how far from the net?

A. It was a foot and a half; maybe two feet.

Q. What occurred thereafter?

A. Well, Mr. Pollinger and some property men picked Mrs. Pollinger up, and took her out of the ring immediately.

(Testimony of Chandler P. Miller)

Q. Did you hear anything said by her at that time and place? A. No, sir, I didn't.

Q. Where were you just immediately after she struck the ground? [505]

A. I was standing at No. 3 center pole, just back of the center pole; I would say between the center pole and the point where that stake is.

Q. Approximately how many feet from where she fell?

A. She fell toward the forward part of the ring. That would be on the opposite side from me, about 30 feet.

Q. What did you do then, when she struck the ground?

A. I looked at the rigging immediately, because I couldn't get out there to help her in time.

Q. What did you observe in that connection?

A. I observed the rigging in the position such as you see it now.

Q. Was it in the same position then as it had been when it was erected? A. Yes, sir.

Q. At the opening of her act? A. Yes, sir.

Q. Was one side down some five or six, or four or five inches? A. No, sir, it was not.

Q. It was perfectly level? A. Yes.

Q. Was there anything broken on the trapeze?

A. No, sir, I could see nothing broken about it.

Q. What did you do then respecting the trapeze?

A. The trapeze was lowered immediately, and packed in the [506] container which was provided for it, and it was taken out of the ring.

Q. Describe just how it was lowered.

A. By a man being at each one of these center poles, and untying the main falls from the pin on which they are

(Testimony of Chandler P. Miller)

tied or fastened. One man gets at the end of the guy line, at the stake, and unhooks the guy line. That is being done while the men are bringing the box into the ring to pack the rigging in. The whole thing, I imagine, takes not more than a minute and a half.

Q. A minute and a half to strike the whole thing?

A. Yes, sir.

Q. You stated there were marks on these ropes to where the point was to which they should be let out or pulled up; so I take it there would be a uniform point to which they would consistently be tied up to.

A. It would vary each day. There might be a slight variation, because the canvas has a certain elasticity, and where you go out in the morning, and it isn't a dry day, it contracts; if it is a hot day, it expands.

Q. How much would that variance be?

A. Not over six inches.

Q. That would cover it, from very wet to very dry?

A. Yes.

Q. Was the point marked off for driving the guy line stakes? [507]

A. Yes, sir, I got in the habit of stepping that off so far from the center pole, so when the curb ring on the ground was put in place, the stakes would be about four feet outside of the ring.

Q. The location of them was as uniform as was your ability to step them off? A. Yes, sir.

Q. I presume you did that many, many times?

A. Yes.

Q. Can you state you got it more or less precisely and accurately by that time, September 12th? A. Yes.

(Testimony of Chandler P. Miller)

Q. Do you recall who participated in the striking of the trapeze after the accident?

A. The regular rigging men at this particular ring did it. Do you want me to name them?

Q. If you can.

A. I don't know that I can recall the entire amount of them, but I know probably two or three.

Q. Who were the two or three?

A. One was Mr. La Bay; another Mr. Parsons; another was Jack Lysaught; and another Joe Horton. There were others. Those are all I can name right now.

Q. Did you look at the trapeze and its equipment immediately after it had been struck?

A. I looked at it before it had been struck. [508]

Q. Was anything broken, or out of order, or out of place, before it had been struck?

A. No, sir, I saw nothing.

Q. Or any other rigging, or lines, including the falls attached to this trapeze?

A. No, sir.

Q. Did you hear any snap or noise when the fall occurred?

A. No, sir I heard nothing like that.

Q. You heard Mrs. Pollinger testify that the 8-hook at the top, where it hooked into the crane bar, was overlapped, did you not, at the outset of this case?

A. I believe I did.

Q. What effect would that have, if it were overlapped, on the trapeze bar below?

A. Whichever side was overlapped, it would raise that side up.

(Testimony of Chandler P. Miller)

Q. You heard Mrs. Pollinger testify that the clevis attached to the crane bar was hooked up on the elbow or knob of the crook of the block and tackle, on the same side that the figure 8 hook was overlapped on, did you not?

A. Yes, sir.

Q. Isn't it true, or is it true, that that particular fall involved has a slant upward from the trapeze?

A. It does, a slight bit, yes, sir.

Q. In any event, when the trapeze is guyed out it does not have a fall downward, does it? [509]

Mr. Marcus: That is assuming a fact not in evidence, and is leading and suggestive.

Mr. Combs: I will withdraw the question.

Q. What would be the effect on the trapeze bar below, if the clevis were up to the knob of the hook, on that fall on the same side as the figure 8 hook was?

A. Well, it would have a tendency to raise the crane bar on that side.

Q. And the figure 8 hook would not compensate for the shortening of the ring on that side, caused by the tangled up condition of the 8 hook, would it?

A. Well, the thing—

Q. Read the question.

(Question read by the reporter.)

A. No, sir, it would not.

Q. Now, were you about to explain your answer? Go ahead and explain it.

A. The thing I was thinking of was the difference in the size of the hook, with the hooks on the shackle in the top of the crane bar, and the figure 8 hook, and the sister

(Testimony of Chandler P. Miller)

hooks; they are different dimensions. The one on top is much longer than the figure 8 hook.

Q. How much longer is the one on top?

A. The figure 8 hooks on that size rigging, I would say they are at least $3\frac{1}{2}$ or $4\frac{1}{2}$ inches inside of the hook measurements. [510]

Q. That is, the measurement from the nub of the hook to the lowest portion of the hook? A. Yes.

Q. It would be $3\frac{1}{2}$ to 5 inches?

A. $3\frac{1}{2}$ to $4\frac{1}{2}$; maybe about 4 inches.

Q. Would it be possible, with this particular hook involved in this case, for the clevis to become hooked on the nub of the hook?

A. It would have been possible, but it would have been very hard to get the rigging out without it jumping out again, because there is nothing there to hold it. It is not substantial.

Q. Is the surface rough?

A. No, sir, it is sort of rounded, the outer surface, and it would, in my opinion, become disengaged rather easily.

Q. Would it become disengaged at the time any pressure was put on the guy lines? A. Yes.

Mr. Marcus: This line of questioning is assuming something not in evidence. In the first place, he has never testified that that situation ever occurred to him.

The Court: There is no question unanswered.

Q. By Mr. Combs: Was it in the condition she says it was at that time and place? A. No, it was not.

Q. What condition was it in? [511]

A. It was in its normal condition. The hook was engaged in the clevis or shackle.

Mr. Combs: That is all.

(Testimony of Chandler P. Miller)

Cross-Examination

Q. By Mr. Marcus: Mr. Miller, you said you had some work to do in another ring, did you not, at the time Miss Olvera began her act, and you left her ring and went to another ring?

A. I was in the next ring, alongside.

Q. What work did you have to do there?

A. There was another act going on. This act terminated before Miss Olvera's act.

Q. Tell me the work you had to do in the other ring.

A. I had to supervise the moving of the rigging out of the way.

Q. Were you there all the time?

A. No; about a minute and a half.

Q. What did you do there during that period of time?

A. I was in charge of this ring, known as No. 3 ring. I had eight men working there, moving the different props in and out of the ring, and getting ready for the next number.

Q. It was during that period of time you were absent supervising the erection of the rigging in another ring?

A. Not erecting the rigging; moving it to one side, which was done very fast.

Q. You were watching eight men do it, is that correct?
[512]

A. No, I was not watching eight men do it. I couldn't have done that.

Q. How many men were under your supervision?

A. There was about eight men there. I couldn't watch all eight.

(Testimony of Chandler P. Miller)

Q. You say you were gone about a minute and a half or two minutes? A. About a minute and a half.

Q. What was Miss Olvera doing when you left?

A. I had seen her pulled in her rigging. Her first trick, I believe, was the standing trick. She was to do that at the time I left, and went to the other ring.

Q. You did come back, didn't you? A. I did.

Q. Had the other act stopped?

A. The other act was about finished at the time I came back, that is correct.

Q. What was Miss Olvera doing at that time?

A. Well, Miss Olvera was getting ready to do her final trick.

Q. What was she doing at the time you came back?

A. She was sitting on the bar.

Q. What doing?

A. Being swung by her husband.

Q. You saw that? A. Yes, [513]

Q. Tell me, where were you the previous town before you came to Anthony, Kansas?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial. A. I don't know, sir.

Mr. Marcus: I am testing his memory.

The Court: He has answered. He says he doesn't know. A. I don't know what town we were in.

Q. By Mr. Marcus: Do you know what town you were in the day previous to the time you saw this accident?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

(Testimony of Chandler P. Miller)

The Court: Overruled. You may answer.

A. I don't remember the town.

Q. By Mr. Marcus: Where were you on the day following this accident? A. I couldn't tell you.

Q. You do remember, however, all the details of this act, do you? A. I saw that act every day.

Q. This is not a fair representation, is it, of the conditions existing at the top of this tent on the day in question?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: No, Mr. Combs, that is what he is attempting [514] to explain.

Mr. Combs: I object to the use of the word "fair."

The Court: That is what it is supposed to be. He is not supposed to present anything except his views, as he remembers it.

A. I would like to have the question repeated, please.
(Question read by the reporter.)

A. Does that refer to the position of the rigging?

Mr. Marcus: No, I am referring to the entire conditions existing at the top of the tent at the time.

The Court: Just between those two poles?

Mr. Marcus: That's right.

A. That was the position of the rigging hanging between the two poles, as Miss Olvera would have worked on it. Of course, I have made a crude drawing. I don't propose to call that a level representation of the rigging there, but in making the drawing my object was to make it as level as possible.

(Testimony of Chandler P. Miller)

Q. What I mean to say is this: There were other trapeze, there were other riggings, and there were other ropes and other nets on the top. A. No nets.

Q. Wasn't there a net—you know Mr. Bert Nelson, or did know him at that time? A. Certainly.

Q. He had a lion's act? [515] A. Yes.

Q. Wasn't there a net used in his lion's act?

A. That was used in the number preceding Miss Olvera's number.

Q. That was there at the time?

A. I didn't attempt to put that on here.

Q. Put it on there now. I want to get the exact conditions existing there at the time.

The Court: Go ahead.

A. Your Honor, there was no net up at the time. This rigging was pulled into place. The net was put up for the first number in the show, and there was an arena up inside of this ring. At that time this rigging was completely pulled over to one side, and the net was down from the top of the canvas, over the steel cage.

Q. By the Court: There was no net there at the time of Miss Olvera's act? A. That's right.

Q. Where had the net been before Miss Olvera came out for her act, and at the time Mr. Nelson was performing his act?

A. The net would have hung straight down the center of the canvas.

Q. Did it hang down there? A. It did.

Q. It was inside of that net Mr. Nelson had his lion act? [516] A. Yes.

(Testimony of Chandler P. Miller)

Q. That had been removed entirely, had it, before Miss Olvera's act was to be presented?

A. Yes; that rigging was pulled into position, such as you see it now.

Q. What was done with the net?

A. The net was rolled up and put outside of the ring.

Q. It was taken down entirely?

A. Yes, sir.

Q. By Mr. Marcus: When was it taken down?

A. The net for the animal act was taken down immediately upon Mr. Nelson's completion of his act. The animal act was the second number of the circus, and Mr. Nelson was the last one to present his animal act in that arena, before it was taken down. There were other acts besides his which took place in that arena.

The Court: The question is, when was the net, in which Mr. Nelson had his animal act, removed?

A. Immediately upon completion of his animal act.

Q. By Mr. Marcus: Was that before the completion of Miss Olvera's act?

Mr. Combs: I object to that as having been asked and answered.

The Court: He said it was.

Q. By Mr. Marcus: Where was it hanging? Indicate on the drawing, where was that net hanging at the time Mr. Nelson [517] was having his performance?

Mr. Combs: I object to that as having been asked and answered.

The Court: I think it has been. Mr. Marcus. He says it was hanging down the center of the ring.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Is it a fact that the net was shoved over to the side, and not taken down at all?

A. It was not put over to the side, no, sir.

Q. Do you know who took it down?

A. The entire property crew took it down. It takes about 25 or 30 men to remove that arena. That was one of the first things taken down, because the net held the top steel together, and if that wasn't taken down, you couldn't take the arena down.

Q. Is it not a fact that that net was suspended from the top rings around these poles?

A. No, sir, it wasn't.

The Court: Do you mean during Miss Olvera's act?

Mr. Marcus: During Miss Olvera's act.

Q. Tell me whether there were any other trapeze or any other ropes hanging on the top bale rings on these poles at the time Miss Olvera performed?

A. There was another rigging above hers; the flying act; that was clear above. Her crane bar was five feet wide.

The Court: Just mark that.

A. It would be very difficult to mark it in here, [518] because it is a different type of rigging altogether.

Q. But it had a crane bar and four lines to the center pole?

A. It had eight guy lines, because it was 40 feet long.

Q. By Mr. Marcus: Indicate the guy lines.

A. I couldn't do it, because I am not an artist.

Q. You indicated the guy lines on the others.

A. This rigging has four guy lines. I have no way of indicating here the eight guy lines on the single bar.

(Testimony of Chandler P. Miller)

Mr. Marcus: Do the best you can.

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Proceed, Mr. Miller.

A. Well, the guy lines would come down this way on either side of the center pole, and in line with the center pole. In other words, out here are stakes; about three stakes on this side of the center pole, and three or four stakes on the other side of the center pole.

Q. By Mr. Marcus: Put the four in on the other side; the other four guy lines. You have put in four. Weren't there some on this end of it?

A. On both sides, yes.

Q. You have three indicated here. There would be three on each side of the center pole; on this side of the center pole, and on the other side; there would be an equal division of all eight guy lines? [519]

Mr. Combs: As I understand it, eight guy lines in all; there would be four on each side, or three on each side?

A. No, there would be eight on each side.

Q. By Mr. Marcus: Mr. Miller, have you to the best of your recollection put up the other rigging that was up there? A. The flying act?

Q. Yes.

A. Yes, sir, I have put up the flying act.

Q. This particular flying act that was on there that day?

The Court: He means, have you placed it on the diagram? Was there anything else except that flying

(Testimony of Chandler P. Miller)

act you have referred to, above her rigging, or within the distance between the two center poles?

A. There was a fall used to hang the light up on.

Q. Was it there on the date of Miss Olvera's accident?

A. Yes, sir.

Q. Just indicate where it was. Was it there at the time of her performance?

A. There was a reflected light, with the reflected light downward, in this manner.

Q. Was that light burning?

A. During her final number the lights were out, and this light was burning directly over her act.

Q. By Mr. Marcus: This trapeze you just drew in there, was that as you remember it on the date of this accident?

The Court: Are you referring to Miss Olvera's trapeze? [520]

Mr. Marcus: No, the other.

The Court: He hasn't put in a trapeze. He has put in a crane bar.

Mr. Marcus: A crane bar?

A. It was, and that was above her rigging, and had eight guy lines on each side of it.

Q. What else was there in connection with the crane bar?

A. On the end of the frame was a pedestal board; on the other end of the frame was a trapeze, with the catch act.

Q. Put those on there too, please.

A. Your Honor, I can't see how I can indicate that possibly here.

(Testimony of Chandler P. Miller)

The Court: Do the best you can, Mr. Miller.

A. That would be the way it would look from the end, if you looked straight across the ring.

Q. By Mr. Marcus: Was there a platform?

A. On the other side of the ring.

Q. Put it on the best you can. I want to get everything that was up there.

A. The platform would be pulled to one side out of Miss Olvera's way, by means of a rope and pulley over here; it would be suspended out like that.

Q. By the Court: Mr. Miller, did that second trapeze that you placed in there hang over Miss Olvera's trapeze? I mean, did the bar hang over?

A. This one here, sir? [521]

Q. No, the trapeze. A. This?

Q. No. That's the platform.

A. That is clear at the back part of the ring; it hung clear over the back of the ring, even with the outer part of the ring.

Q. It was pulled up?

A. No, it was not pulled up. It was hanging down, just like it is now, because it was out of the ring. She didn't swing out that far during her number.

Q. How far was it, would you say, from the lines, or whatever you call them?

A. The falls of her trapeze.

Q. About how far away?

A. Well, at least 20 feet.

Q. By Mr. Marcus: You have drawn a crane bar up on the top. Isn't it a fact, Mr. Miller, those were

(Testimony of Chandler P. Miller)

four bars up there; not one single bar; upon which was suspended this platform and the other trapeze?

A. Not four bars, no, sir.

Q. What was it, then?

A. Two swing bars, which were tied back on this pedestal board.

Q. Put those on there, please.

A. They were tied back in this manner, to about here.

Q. All of this did not hang on this one rod, did it?

[522] A. Yes, sir.

Q. Wasn't it a square, 22 feet long, made out of iron rods?

A. No, sir.

Q. How long was it?

A. In the flying act, the rigging was about 40 feet long, and $5\frac{1}{2}$, not over 6, feet wide.

Q. How long would you indicate was the length of the crane bar of Miss Olvera's?

A. Well, I would say 5 feet or $5\frac{1}{2}$ feet.

Q. How long was the length of that other trapeze? The bar, you say, was 40 feet long. How wide?

A. $5\frac{1}{2}$ feet.

Q. Is this the length or width of it?

A. That is the width of it.

Q. And it was 40 feet long?

A. Yes, sir.

Q. What held it up there?

A. It was held up by a main fall, just like this rigging was held up.

(Testimony of Chandler P. Miller)

Q. How many bars were there? If it was 5 or 6 feet wide, and 40 feet long, what held it up there?

A. There was a crow's foot, shaped like your hand, which went from the entire length of this rigging up to a ring. The ring was hooked in this crow's foot, but the cables were made so that the cables ran to one point. [523]

Q. In order for it to be 40 feet long, and 6 feet wide, it would have to be at least enclosed within that dimension, would it not?

A. It would be $5\frac{1}{2}$ by 40 feet.

Q. What caused it to be that wide and that long?

Mr. Combs: I don't think that is an intelligent question.

Q. By Mr. Marcus: He said there was only one crane bar. I am trying to find out if it was four bars fastened together.

A. It was known as the flying act frame.

Q. Draw that frame on there, please.

A. I couldn't draw that on this type of drawing.

Q. You have attempted to draw it there.

A. It is drawn, from a view looking at it straight across the ring.

The Court: That part you have shown would be the side, cross-sectional view, and the width would be about $5\frac{1}{2}$ feet? A. Yes.

Q. 40 feet long? A. Yes.

Q. By Mr. Marcus: In addition to this one rod on the side up there—

The Court: I think he has explained it very clearly. It is a frame, and the frame over-all is 40 feet long and

(Testimony of Chandler P. Miller)

about 5½ feet wide. I don't see that you would want any clearer explanation. [524]

Mr. Marcus: Only to show, your Honor, instead of one bar and one rod, which he said were up there, there was this frame up there.

The Court: He has now called it a frame.

Q. By Mr. Marcus: Now, can you think of anything else that was up there? A. No, sir.

Q. By the Court: Mr. Miller, that framework you have spoken of there was under the light which you have referred to, the center light?

A. Yes, sir; this light was adjustable; it could be lowered to any height desired, but when it was put up in front of the act, or above the act, it was usually above the crane bar.

Q. That framework you have now spoken of was not a solid framework, so that the light could not be seen from beneath, but I assume, from what you have said, there were openings in it, and the light would shine through?

A. Yes; in other words, like this was 40 feet long, there would be another piece of pipe over here connected with the bars across this way.

Q. There were four or five of those bars?

A. Yes.

The Court: I think that is what Mr. Marcus had in mind.

A. I was merely trying to show an end view. I couldn't show it crosswise. [525]

Q. By Mr. Marcus: I will ask you, Mr. Miller, is it not a fact—I will show you this picture—that this pic-

(Testimony of Chandler P. Miller)

ture indicates that frame and the platform and the trapeze?

Mr. Combs: I would object to that question upon the ground that no proper foundation has been laid; it is incompetent, irrelevant and immaterial.

The Court: If he says it is a fair representation, that is sufficient.

Mr. Combs: Your Honor, this purports to be equipment used in Madison Square Garden.

Q. By Mr. Marcus: Is this I have indicated to you a fair representation of the flying trapeze, this one you have described up here, and the platform and the trapeze hanging on it?

Mr. Combs: Same objection.

The Court: Overruled.

A. No, sir, it isn't a view, I would say, which is comparable to this rigging.

Q. By Mr. Marcus: Would you say that was not the rigging? A. Yes, sir, I would say that.

The Court: Any further cross examination?

Mr. Marcus: A few more questions, your Honor.

Q. Now, on this particular day in question, what city were you in?

A. We were in Kansas, the State of Kansas. I can't remember the name of the city. [526]

Q. You don't remember even the name of the city?

The Court: He said he did not remember, Mr. Marcus.

Mr. Combs: It is argumentative.

(Testimony of Chandler P. Miller)

The Court: There is no use asking him the question again. He just said he did not remember it.

Q. By Mr. Marcus: Mr. Miller, wasn't it Anthony, Kansas? A. I believe it was.

Q. Did you see Karl Pollinger come out into the ring on the date of the accident? A. Yes, sir, I did.

Q. Who came with him when he came out?

A. When he first came out he came out by himself.

Q. Didn't he come with anybody?

A. Not to my memory, no, sir.

Q. Isn't it a fact that he and America came out together?

A. Just before she entered the ring they did come from the outer part of the ring, that is, together, but he came ahead of her, and watched the guying out of the rigging, before she ever entered the ring.

Q. You saw him come out? A. Yes, sir.

Q. You say he stood at this point, indicating the outside of the ring? A. Yes, sir, he did.

Q. And you saw him on that particular day indicate with his hands like this? [527] A. Yes, sir.

Q. And you saw the other men at each one of these stakes in the ground, did you, on that particular day?

A. I did.

Q. You remember that, did you? A. Yes, sir.

Q. And did he leave the ring? Did he go out of the tent?

A. He left after the guying out was completed.

Q. You saw him leave? A. Yes, sir.

(Testimony of Chandler P. Miller)

Q. Where did he go?

A. He went over to meet Miss America Olvera.

Q. Tell me who was standing at this post No. 1, this stake? What was the name of the man?

A. I don't remember the name of the property man.

Q. Who was standing at No. 2 post here?

A. Philip La Bay, I am pretty sure.

Q. You are sure of that? A. Yes, sir.

Q. Who stood over here at No. 3?

A. That wouldn't be No. 3. That would be No. 2 pole, on that side.

Q. No. 2 pole, who stood there?

A. I don't remember, sir.

Q. Who stood at No. 4, over here? [528]

A. I remember Tommy Parsons was at one; just which one, I don't remember. I remember there was a man at each one of them. They had no particular post to guy out. They could take any post of any of the four guy lines—any man assigned to do that work.

Q. You did not pay any particular attention to what man was standing at any of these stakes, did you?

A. I know there was a man there.

The Court: Just answer the question.

A. I don't know who was there, no, sir.

Q. By Mr. Marcus: Who came out with America Olvera?

A. Does that mean just before she entered the ring?

Q. No, sir, that means when she came into the tent.

A. I did not see Miss Olvera when she came into the tent until I just saw her after she got in the tent, just previous to her entrance to the ring.

(Testimony of Chandler P. Miller)

Q. Did you see anyone come in with her?

A. No, sir, I did not.

Q. Didn't her husband walk in behind her?

A. At the time of her entering the ring, yes, sir, he did.

Q. Did he enter the ring? A. He did.

Q. You saw him? A. Yes, sir.

Q. Then what did he do? [529]

A. He went over to the ascension rope and assisted by property men helped Miss Olvera into her rig.

Q. Did you look over this rigging before she went to perform her act? A. Yes, sir.

Q. Did you see the lower bar? A. I did.

Q. Was it level? A. Yes, sir.

Q. Where was the entire rigging before she came into the tent?

A. The rigging, before she came into the tent, was like you see it hanging there right now.

Q. Where was this rigging when the other act was going on previous to Miss Olvera's act?

A. It was pulled over to the side, as I explained before.

Q. Over here on this side?

A. Yes, sir, I believe it was that side.

Q. But it was still attached, was it, to the main poles in the manner that you have indicated?

A. The hooks were up there, yes, sir, such as that.

Q. Who brought the apparatus off of this pole and put it in the center of the tent?

A. Mr. La Bay and Jack Lysaught. There was one on each pole. That was their regular station.

(Testimony of Chandler P. Miller)

Q. You saw them do that? [530] A. Yes, sir.

Q. Did you see them tighten up any of the lines that brought that trapeze over?

A. Jack Lysaught, yes, sir; Philip La Bay, no, sir.

Q. What did you see Jack do?

A. I saw him slack off the side over there, to let the rigging over, and I know he went over to these other guy lines; just which ones, I couldn't say.

Q. What were you doing when these men were doing their work?

A. I was standing back here where I could watch them doing their work.

Q. You saw them do it? A. Yes, sir.

Q. You were supervising their work?

A. It was under my supervision.

Q. Did you hear that deposition that was read here this afternoon?

Mr. Combs: That is objected to as argumentative.

Q. By Mr. Marcus: Did you hear that deposition read here this afternoon?

A. I heard a lot of depositions read. I don't know to which one you refer.

Q. Did you hear the deposition of Blackie Williams?

A. Yes, sir.

Q. Did you hear him state some four or five times in [531] that deposition that he was the supervisor of rigging?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Who was the supervisor of rigging, now; was it you or Blackie Williams?

A. Blackie Williams was the boss property man. In other words, he was boss of the whole department. I was his first assistant. In other words, I was ranked on the department next to him. I received my orders from him, from Mr. Cronin, also Mr. Robert Thornton, equestrian director of the show.

Q. In other words, you took your orders from Blackie Williams? A. Yes.

Q. Then you were not supervisor of rigging, were you?

Mr. Combs: I object to that as calling for the conclusion of the witness.

A. I supervised a lot of rigging in the show.

Q. By Mr. Marcus: Tell me when this rigging went up.

A. It went up after the flying act was put up every morning.

Q. It went up in the morning, didn't it?

A. Yes, sir.

Q. When was this trapeze erected?

A. That is when it was erected. [532]

Q. In the morning? A. Yes, sir.

Q. And it hung there during the day, and was hanging there during all the preceding acts?

A. During the preceding acts to hers.

Q. Was it ever, on this particular date, brought in in this box just before Miss Olvera was to perform, and hoisted at that time? A. No, sir, it was not.

(Testimony of Chandler P. Miller)

Q. Now, Mr. Miller, when this trapeze was hung over on this side, all of these lines, indicating the left from where I stand, were necessarily longer, weren't they, in order to reach over to this pole?

A. These lines were taken off the left side, and carried over to the right side.

Q. All of these lines on the top, I mean?

A. Yes, that side had to be let over to let the crane bar go over on the right hand side of the ring.

Q. That would of necessity drop the left side of this crane bar, wouldn't it?

A. Not necessarily.

Q. Well, did it?

A. I didn't see it in that position.

Q. What position did you see this crane bar on this pole?

A. The crane bar was simply moved over to the right by [533] letting off the main fall on the left side, and taking up the main fall on the right side; just merely pulled over so it would be out of the way of Bert Nelson's act, and the other act preceding Miss Olvera's number.

Q. Did you testify it was tied onto this pole, the right hand pole? A. I believe I did.

Q. How was it tied?

A. By slacking off the main fall on the left side, and taking up on the main fall on the right side, it simply pulled it over.

Q. Wasn't the entire trapeze tied to the pole?

A. It may have been. I couldn't state that.

Q. Was it on this particular day?

A. I couldn't say.

(Testimony of Chandler P. Miller)

Q. You don't remember that?

A. I don't remember that.

Q. When it was brought back did you see that?

A. Yes, sir, I did.

Q. Who brought it back?

A. The man slacked it off on the right hand side, which was Jack Lysaught, and Philip La Bay took up the slack on the other side, which pulled it in position in the center, in which it hangs now.

Q. Did you look up at the top of the crane bar?

A. I did. [534]

Q. Did you see it? A. I did.

Q. What did you observe about it, if anything?

Mr. Combs: At what time?

Mr. Marcus: When it was brought back.

A. I observed it hanging there just as it is now.

Q. Was it level at that time?

A. Yes, sir, it was.

Q. And where was Mr. Pollinger at that time?

A. It was level, but the guy lines were not attached yet.

Q. It was level up here?

A. It was approximately level.

Q. What happened to the lines that you have indicated here? When this is level, are they taut?

A. Yes, sir.

Q. They are tight? A. Yes, sir.

Q. Who tightens them?

A. They would become tight by the men guying out on the stakes below, by taking in on the guy lines; that naturally would tighten the main falls in the top.

(Testimony of Chandler P. Miller)

Q. These are sort of pulleys?

A. That is known as a double block or pulley.

Q. There is a pulley over here?

A. That's right.

Q. A pulley on this corner, one up on the top of the
[535] tent? A. Yes.

Q. What causes these lines to become tight that hold the crane bar up?

A. By a downward pressure the guy lines naturally straighten out the falls and make them straight.

Q. Was there anything you lined up the crane bar with?

A. It isn't necessary to level with any object. You can tell by glancing at anything whether it is level. Experience teaches you that.

Q. You didn't level it up with anything?

A. Not particularly. I leveled it by eye alone.

Q. Let us assume that the clevis was overlapping, and the 8-hook—

A. This is not the clevis. It should be in this place.

Q. Let us assume that it was overlapping; at the same time was it not possible, by pulling on these guy lines to have made this trapeze bar absolutely level?

A. I don't believe it could be possible, because there is a difference in the dimensions of the hook hooking the main fall in the right hand edge of the crane bar and the figure 8 hook is a smaller dimension than the other one.

(Testimony of Chandler P. Miller)

Q. These were all adjusted on pulleys?

A. Yes, but that had nothing to do with hooks and blocks.

Q. But you did pull these lines and adjusted them to make the trapeze level, didn't you? [536]

A. That is the process of guying out.

Q. So, if the crane bar is slightly out of line, or the trapeze bar is slightly out of line, you can easily adjust it to become level by pulling on these guy lines over here, couldn't you?

The Court: Will you read the question?

(Question read by the reporter.)

A. No.

Q. By Mr. Marcus: How do you level up the trapeze then, if not by pulling and tightening the guy lines?

A. You level it by pulling the guy line, but if the hooks are overlapped, it couldn't be level. The only thing to do would be to straighten out the hooks, or straighten the guy line, or it might straighten out itself.

Q. Did you ever have a hook overlap?

A. Yes.

Q. When?

A. At the Detroit winter circus, in 1930.

Q. I am talking about the trapeze itself.

A. No.

Q. How do you know it couldn't be leveled out by pulling the guy lines?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: It is argumentative.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Did you at any time to your knowledge [537] ever level out a trapeze?

Mr. Combs: I object to that as having already been asked and answered.

Q. By Mr. Marcus: Level out this trapeze, when the bottom trapeze bar wasn't level.

A. I have seen trapeze bars where the top would be level, and the bottom would not be level. It is always because one of the sides of the trapeze was longer than the other side.

Q. I am asking about this particular trapeze.

A. Not on this trapeze, no, sir.

Q. You never experienced that before?

A. No, sir.

Q. Did you ever hold the net?

A. No, I never did.

The Court: Mr. Marcus, is there to be very much more of this cross examination?

Mr. Marcus: Not much more.

The Court: When you say not much more, what do you mean by that?

Mr. Marcus: I have some other matters taken from this man's deposition.

The Court: It is almost 5:00 o'clock. But before we adjourn I would like to ask Mr. Miller:

Q. Mr. Miller, when you say Mr. Pollinger was out there, and held his hand out in front of him, indicating to those at [538] the guy ropes, was he looking at the trapeze bar, do you know?

A. Yes, sir, he must have been.

(Testimony of Chandler P. Miller)

Q. After he had done that to a certain extent then he held his hands, and no change was made in the guy ropes? A. That's right.

Q. When you have done that, has it been for the purpose of leveling the trapeze?

A. Yes, sir, the reason—

The Court: You may answer yes or no, and you can explain. It was for that purpose? A. Yes.

Q. Now you may explain.

A. We got up a system of signals, because lots of times you were required to change the riggings during the process of the performance, when there is a lot of music going on and noise in the tent. You could simply point to a man, and indicate the guy line to be pulled over, and he would start to pull, and you would stop him by a motion of your hand.

Q. Just as though someone were approaching you, and you desired to have him stop, and he couldn't hear you, you would hold your hand up, and indicate by the palm of the hand toward him to stop? A. Yes.

Q. Simply as a switchman or a brakeman might, in the process of controlling the movement of trains—to that [539] similar effect? A. Yes, sir.

(The court after admonishing the jury here took an adjournment until 10:00 o'clock a. m., Tuesday, January 11, 1944.) [540]

Los Angeles, California, Tuesday, January 11, 1944;
10 a. m.

(Stipulated that the jurors were present and in their places.)

C. P. MILLER

(Recalled.)

Cross Examination

(Resumed.)

Q. By Mr. Marcus: Mr. Miller, I presume that you are acquainted with the appearance of the tent on the outside? A. Yes, sir.

Q. I will ask you whether or not that is a correct photograph of the tent of the Al G. Barnes Circus for the season of 1937.

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial. In the first place, I haven't seen that document; but even so, I take it to be a printed copy, not a photograph. We object to this as incompetent, irrelevant and immaterial, and no proper foundation laid.

The Court: Read the question.

(Question read by the reporter.)

The Court: Overruled. You may answer.

Mr. Combs: If your Honor please, may I say one thing more about the objectionable feature; this is not a photograph itself. This is a printed copy of something.

The Court: On that basis the court will sustain the objection.

Q. By Mr. Marcus: Is that a fair representation of the [541] tent for the season of 1937?

Mr. Combs: I object to that as calling for a conclusion of the witness; no proper foundation laid.

(Testimony of Chandler P. Miller)

The Court: Overruled. You may answer.

A. I would say this is not a true replica of the big top. However, it is a similar likeness to the menagerie tent.

Q. By Mr. Marcus: Would you say that was the menagerie tent?

Mr. Combs: Same objection.

A. It is a similar top to the menagerie top.

Q. By Mr. Marcus: Does that photograph or representation indicate that is for the season of 1937, and shows the main entrance?

The Court: You don't need to argue.

Mr. Combs: I would like to respectfully appeal to your Honor—not that this is a particularly significant matter, because I doubt it, but under the rules of evidence, a proper foundation must be laid. I ask that the evidence so far be stricken.

The Court: There has been none since he said it did not represent the main circus; he said it just represented the menagerie.

Mr. Marcus: Have you seen this?

Mr. Combs: Yes.

Q. By Mr. Marcus: I show you a photograph, and ask you whether or not that photograph is an actual photograph of the [542] main top of the Barnes show for the season of 1937?

Mr. Combs: If your Honor please, I don't want to make it appear to the court that I consider this an extremely important matter, because I don't, but the rules of evidence should not be abused, because there has not been

(Testimony of Chandler P. Miller)

any showing that he knew anything about this before, or knew from what angle it was taken, or who the photographer was. Those are necessary elements for identifying the photograph.

The Court: I would like to have you furnish some authority on that.

Mr. Combs: We have furnished authority on that point. I will furnish authority when I have an opportunity, but I cannot do it at this moment.

The Court: The court did not expect you to do it at this moment. The court will take a recess, and see if you can find some authority for that. The jury will retire to the jury room and remain there until called by the bailiff, bearing in mind the admonitions of the court heretofore given you.

(Short recess.)

The Court: The jurors are all present.

Mr. Combs: In the light of our examination of the law in chambers, I wish to withdraw my objection. In my opinion the court's ruling is correct.

The Court: It may be withdrawn, and the court appreciates your statement. [543]

Q. By Mr. Marcus: Mr. Miller, will you examine this photograph, and tell me whether or not that is a correct photograph of the main top of the tent for the 1937 season?

A. It is very difficult to tell, because that only shows the sectional view. I couldn't say.

(Testimony of Chandler P. Miller)

Q. Couldn't you tell us whether, according to that sectional view, that is a correct photograph of the tent?

A. It is a correct view of the circus tent. I couldn't say it is the Barnes show, because it does not show enough detail to answer that question.

Q. What is your recollection of the Barnes tent, outside of this photograph?

A. The Barnes circus big top contained four center poles. It doesn't show but two there, I believe.

Q. Let us look at it carefully. Doesn't it show four poles in that photograph?

A. Not center poles, no, sir.

Q. You don't see four center poles there?

A. No, sir.

Q. What else do you remember about the details of the Barnes main top for the 1937 season?

A. I know that the middle point in the big top, the measurement from center pole to center pole was approximately 50 feet. I know the height of the top of the tent from the ground to the bale rings was 43 feet. I know that the measurement of the big top was 160 feet.
[544]

Q. What holds the canvas up?

A. The center poles and quarter poles.

Q. What supports the canvas across between the center poles?

A. It is supported by ridge rope between two bale rings.

Q. Was there a cable on top of the two poles?

A. There were guy lines running out from the poles, yes, sir.

(Testimony of Chandler P. Miller)

Q. What held the two poles together?

A. Guy lines.

Q. Didn't those two guy lines run from both poles, joining them?

A. There is a ridge rope up there, but it was slacked off at the time the tent was in the air.

Q. How much was it slacked off in the center, between the two poles?

A. It is always slacked off.

Q. Is the top of the tent slacked off in the center?

A. There is a slight sag.

Q. How much of a sag?

A. Not more than a foot or a foot and a half.

Mr. Marcus: I ask that this photograph be marked for identification at this time.

Mr. Combs: No objection.

The Court: Let it be marked Plaintiff's Exhibit 7.

Mr. Marcus: I ask that this photograph be marked for [545] identification at this time.

The Court: Let it be marked Plaintiff's Exhibit 8 for identification. You refer to that as a photograph. I don't think it is a photograph.

Mr. Marcus: It is a rotogravure.

The Court: Whatever it is, it is the first page of this pamphlet.

Mr. Marcus: That's right.

The Court: That may be marked Plaintiff's Exhibit 8 for identification.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Mr. Miller, did you say there were two ropes holding up the canvas of the tent between the two main poles?

A. There is a ridge rope which the canvas is raised to; that is, the canvas indicated at the line showing the two bale rings.

Q. How many ropes are there between the two rings holding up the canvas of the tent?

A. There is nothing holding up the canvas between the rings.

Q. Between the two main poles how many ropes hold up the tent?

A. Guy ropes outside, not inside, of the tent. On the center poles are the main falls which hold up the bale ring. The main fall is fastened inside, and has a pin through the poles. [546]

Q. Then, do I understand you, Mr. Miller, there are no ropes on the inside of the tent running from the main cable between the two poles holding up the canvas of the tent?

A. No, sir, there is nothing holding up the canvas, because the bale ring supports the canvas, such as you see indicated there.

Q. What holds the canvas up as it goes from the edge of the tent, from the top to the side?

A. Quarter poles.

Q. Just poles? A. Yes.

Q. No ropes? A. There are stay ropes.

Q. How many are there?

A. A number of stay ropes, about six feet apart, from the bale ring out to the edge of the canvas.

(Testimony of Chandler P. Miller)

Q. Between both poles? A. Yes.

Q. Six feet apart? A. Approximately that.

Q. How far is it between the two main poles?

A. About 50 feet.

Q. About how many ropes would there be around the edge of the tent?

The Court: You can figure that out.

Mr. Marcus: Approximately ten? [547]

A. I would say about that.

Q. Those all come up to this top ring or cable, don't they?

A. There is no cable, but there is a sort of what we call a ridge rope, made out of manila rope.

Q. You don't call it a cable; you call it a ridge rope?

A. That's right.

Q. Those are visible from the inside of the tent?

A. Yes.

Q. Those likewise are over here?

A. They are tied up; tied very short, but up out of the way.

Q. Can you step down here, and draw those?

A. I can indicate the position approximately where they are. You can't draw them.

Q. If you will, please.

A. They are pretty close to this ridge rope. They don't hang down more than about three or four inches, when they are tied.

Q. Run them down, please, to the bottom of the tent.

A. They don't run down to the bottom of the tent.

(Testimony of Chandler P. Miller)

Q. Didn't I understand you to say a few moments ago that they ran out to the edge of the tent?

A. They are the guy ropes on the center pole. The guy ropes on the center pole run clear out to the edge of the tent. There are also ropes which the canvas is sewed to, [548] which run clear out, about ten feet apart. They are on a line with the stay ropes, which you see in the center of the ring.

Q. Can you draw those? A. I can't do it.

Q. Isn't it possible to do it?

A. Not on that drawing.

Q. Why?

A. You can't show the outer part from the inside.

Q. Are those ropes outside?

A. On the under part of the canvas, sewed to the tent.

Q. Inside of the tent? A. Yes.

Q. You can't do it?

A. I can't show it on that drawing, no, sir.

Q. Did you ever get in touch with America Olvera after the accident?

A. Not that I recollect, to my knowledge.

Q. Did you ever send her a telegram?

A. I never did.

Q. I will ask you to read that telegram to yourself, and tell me whether or not you didn't send it to her.

A. I don't recall sending that myself. Mr. Williamson may have sent it. I didn't.

Q. Your name is Ringling Miller?

A. My name is Miller. They call me Ringling. [549]

(Testimony of Chandler P. Miller)

Q. You don't remember sending this telegram?

A. Not me, no, sir.

Mr. Marcus: May it be marked for identification?

Q. Where were you on April 13, 1939?

The Court: You are asking that it be marked for identification?

Mr. Marcus: Yes, your Honor.

The Court: It may be marked Plaintiff's Exhibit No. 9.

A. I did not understand your question.

Q. By Mr. Marcus: I asked where you were on or about April 13, 1939.

A. On April 13, 1939, I was employed by the Ringling Bros. Barnum & Bailey Circus.

Q. Where were you at the time?

A. Well, we were in the eastern section of the United States about that time. I don't remember the location of the show at that particular time.

Q. Weren't you in New York on that date, performing at Madison Square Garden, on April 13, 1939?

A. No, sir.

Q. Did you and Blackie Wallace and Ned Huey and the rest of the riggers get together and send a telegram to Miss Olvera regarding her case?

A. No, sir.

Q. Read this telegram, and see if that doesn't refresh your memory. [550]

Mr. Combs: May I see it? I don't see his name on that at all.

Mr. Marcus: Do you see the word "riggers"?

(Testimony of Chandler P. Miller)

Mr. Combs: "And riggers," yes.

Mr. Marcus: Read this telegram, and tell me whether or not you and the other riggers didn't send that.

A. No, sir.

Mr. Marcus: May this telegram be marked for identification?

The Court: Let it be marked Plaintiff's Exhibit 10 for identification.

Q. By Mr. Marcus: Mr. Miller, did you say that Mr. Williamson was your superior, your boss?

A. Yes, sir, he was.

Q. Was he your boss on the date of this accident, September 12, 1937? A. Yes, sir.

Q. What did you do just before Miss America went on to perform?

A. Just before Miss America went on to perform I was standing in the rear of the ring, in the vicinity of the bandstand, watching her rigging being guyed out.

Q. You were supervising it at that time?

A. No, sir, I was not.

Q. What were you doing with reference to her rigging?

A. I was watching it being guyed out. [551]

Q. What did you do with reference to her rigging that afternoon? A. Nothing at all.

Q. You had absolutely nothing to do with Miss Olvera's rigging that afternoon?

A. I did not touch her rigging at all.

Q. So you had nothing to do with her rigging, the supervision of it, or otherwise, did you?

(Testimony of Chandler P. Miller)

Mr. Combs: I object to that as calling for his conclusion.

Mr. Marcus: I will reframe it.

Q. Did you in any way direct or tell anyone to oversee the placing of her rigging in position for her performance that afternoon?

Mr. Combs: I object to that as calling for the conclusion of the witness, and compound; incoherent, unintelligible, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: What did you do, Mr. Chandler Miller, with reference to Miss America's rigging that afternoon, before she went on, at any time during the performance of the show that afternoon?

A. Prior to her going in to do her number I stood at the spot I have just indicated, and I watched the rigging being guyed out.

Q. Is that all you did, was to watch it? [552]

A. That is all.

Q. You had nothing to do in connection with it, did you?

Mr. Combs: I object to that as calling for the conclusion of the witness.

The Court: He may answer. Overruled.

A. I had nothing to do other than just as I have explained.

Q. By Mr. Marcus: You had nothing to do, did you?

Mr. Combs: I object to that as argumentative.

The Court: Sustained.

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: You didn't do anything with reference to her rigging, did you?

A. No, sir, I did not.

Q. You say you stood there watching what was being done?

A. I did.

Q. Isn't it a fact, Mr. Miller, that the only time that you had anything to do with Miss Olvera's rigging was in the original erection of it in the morning, when the tent went up?

A. I looked at it.

Q. Can you answer the question yes or no?

A. I watched the rigging guyed out every day.

Q. Guyed out every day?

A. Yes.

Q. Can you answer the question: That the only time you had anything to do with Miss Olvera's rigging was in the morning when the big top went up? [553]

Mr. Combs: I object to that as having been asked and answered many times.

The Court: You may answer yes or no, and explain your answer, if it is necessary to explain it.

A. Well, I would answer yes, because I did supervise the erection of the rigging in the morning. I was always in a position to watch the guying out, every performance.

Q. You remember giving your deposition, don't you, Mr. Miller?

A. I believe I do.

Q. Well, do you?

A. Yes, sir.

Q. And that deposition was given about two and a half or three years ago, wasn't it?

A. No, sir.

Q. How long?

A. Well, it was in December, I believe, 1939.

(Testimony of Chandler P. Miller)

Q. That's more than three years ago, isn't it?

A. Certainly it is.

Q. Is your memory any better today than it was then? A. What?

Q. Is your memory better today than it was at that time, in reference to what transpired in 1937?

A. No.

Mr. Combs: I object to that as argumentative.

The Court: It has been answered. [554]

Mr. Marcus: Will you stipulate with me, counsel, that he testified according to the statements herein?

Mr. Combs: What are you reading from?

Mr. Marcus: There will be a lot of places.

Mr. Combs: Give me the page of the transcript.

Mr. Marcus: Page 510, question 13.

Mr. Combs: So stipulated.

Mr. Marcus: I can skip that question now, because I will come back to it, and go to 510, question 20:

"Q—did you work for the Al G. Barnes Amusement Co. on September 12, 1937, as a rigger?

"A—Yes, sir.

"Q—Did you know America Olvera Pollinger, the plaintiff in this action?

"A—Yes, sir.

"Q—When did you first meet her?

"A—I met her first on the opening of the circus season in 1937 in San Diego, California.

"Q—Did you ever act as a rigger for her?

"A—No, sir.

(Testimony of Chandler P. Miller)

“Q—Did you ever act as a rigger on any equipment used by America Olvera Pollinger?

“A—The only thing I have ever done with respect to Miss Olvera was to supervise the original erection of her rigging each morning in the tent.

“Q—State what times you acted as a rigger on any [555] equipment used by America Olvera Pollinger?

“A—Every day I acted as I have described in my answer to question 24.

“Q—Did you act as a rigger for America Olvera Pollinger on that day?

“A—Only in the capacity of supervising the original erection of her rigging in the tent that morning.

“Q-30—

“A—I supervised the original erection in the tent that morning.

“Q-37—”

Mr. Combs: You had better read the questions, counsel.

“Q-37—Did he participate in or help you in putting up America Olvera Pollinger’s rigging on September 12, 1937?”

Mr. Combs: You didn’t read 30.

“Q—Did you do anything in the erection of the America Olvera Pollinger equipment or rigging on that day?

“A—I supervised the original erection in the tent that morning.

(Testimony of Chandler P. Miller)

"Q-37—Did he participate in or help you in putting up America Olvera Pollinger's rigging on September 12, 1937?

"A—No, sir. Mr. Pollinger did not help me with the original erection of the apparatus which I supervised in the morning but on that day he supervised as usual the leveling off of her apparatus just prior to her performing on the same."

Mr. Marcus: Page 523: [556]

"Q—Is it not a fact that during your entire period of employment you erected the rigging of the trapeze performers in the Barnes show?

"A—I did not actually erect the rigging, but I supervised the original erection in the tent in the morning of each day.

"Q—Who supervised the erection of Miss Olvera's rigging on September 12, 1937?

"A—I did.

"Q—Did you act as a rigger for Miss Olvera on that day?

"A—No, sir, only supervised the original erection of her rigging in the tent on that morning.

"Q-45—Did you always during the entire season supervise the erection of Miss Olvera's apparatus?

"A—Yes, sir. But I only supervised it when it was originally put into position in the morning. I did not give it the final inspection.

"Q-47—Did you help to erect the rigging on September 12, 1937, or merely supervise this erection?

"A—I supervised it in the morning as I have explained in answer to question 45."

(Testimony of Chandler P. Miller)

Q. Mr. Miller, didn't you hold—

The Court: Mr. Marcus, did you ask him whether those questions were asked, and those answers given?

Mr. Marcus: Counsel stipulated with me that they were.

The Court: Proceed. [557]

Q. By Mr. Marcus: Didn't you hold the net that day? A. No, sir.

Q. Let me try to refresh your memory, sir. You say George Williamson was your superior? That was your testimony before? A. He was.

Mr. Combs: What page are you reading from?

Mr. Marcus: 500. Mr. Miller, is it not a fact—and for the purpose of refreshing your memory—that you did hold this net, I will refer to the testimony of Mr. George Williamson to this effect:

“Q—How many men held the net? Name them.

“A—About ten men. Their names were Thomas Parsons, Philip La Bay, Joe Horton, Chandler Miller, Howard Mentz, a man called Whitey and the other names I can't recall right now.”

Q. By Mr. Marcus: If your superior officer so testified, as it is in this record, does that not refresh your memory of the fact that you did hold the net?

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial; using the testimony of someone else in an attempt to impeach this witness. Obviously this was not this witness' testimony.

The Court: Objection sustained, and the jury instructed to disregard the question, and not to draw any inference from its asking. [558]

(Testimony of Chandler P. Miller)

Q. By Mr. Marcus: Mr. Miller, you have not been employed by the show since what year?

A. The Barnes show, 1938 was the last year I was there, Al G. Barnes.

Q. You were in Hollywood during the year 1939?

A. Yes, sir, we showed there every year.

Q. Are you sure you were there in 1939?

A. Not the Barnes show, no, sir.

Q. Were you there with the Ringling show in 1939?

A. Yes, sir, I was.

Q. Where did you perform that year?

A. We were not in Hollywood. We were out to what is called Exposition Avenue, I believe it is, in Los Angeles.

Q. Do you remember what month that was?

A. I believe it was September. I am not positive.

Q. That was after the month of April? Are you sure of that, 1939?

A. Yes, it was after the month of April. It was in the fall of the year.

Q. Did you not see America Olvera there on the grounds that year?

A. I don't remember seeing her.

Q. Did you see her in 1938?

A. I don't remember seeing her in 1938.

Q. That is your best memory now, that you do not remember seeing her? [559]

A. That's right.

Q. Did you have a conversation with her in the presence of Blackie Wallace, Ned Huey and other members of the rigging?

A. No, sir.

(Testimony of Chandler P. Miller)

Q. Is it your testimony now that you had none, or that you do not remember?

A. I don't remember having such conversation.

Q. Is it not a fact that at that time you told her that you—

Mr. Combs: We object to the recital of the conversation. The damage will be done. The purpose of counsel's inquiry will be done if he recites any conversation this witness says he does not remember; if he hasn't had any.

Mr. Marcus: No, he said he did not remember.

Mr. Combs: He did not see her. I don't want counsel to recite a long conversation, and ask if he had it, because he will probably answer: I don't remember; I do not know; and the question will be improperly admitted.

The Court: I think that is the only way he can lay his foundation for impeachment. Read the question and objection.

(Record read by the reporter.)

The Court: You did not give the time, any more than the year 1938. Reframe the question.

Q. By Mr. Marcus: Did you not have a conversation with America Olvera during the month of September of 1939 at the grounds of the Ringling show? [560]

A. No, sir.

Q. While it was performing in Los Angeles?

A. No, sir.

Q. Your testimony now is you did not?

A. I did not.

Q. Did you not testify before that you did not remember having such conversation?

(Testimony of Chandler P. Miller)

The Court: Don't argue with the witness, Mr. Marcus; and you should complete your question all in one. But, in any event, you have laid the foundation as to time, place and parties present.

Q. By Mr. Marcus: Is it not a fact, Mr. Miller, that you told—

Mr. Combs: Just a minute, before he asks that question; I object to a recital of a conversation, or purported conversation, which this witness has said he did not have. The purpose of the question can be obvious; that is, to inform the jury of a fact that is non-existent at this time in the record. Without telling counsel the way to proceed, there should be evidence of the conversation produced independently, because this man says no, and his answer can't possibly be anything than: "No, I did not have any such conversation."

The Court: As I understand the rules of evidence, the party seeking to impeach the witness will have to ask—I don't know of any other way to do it, Mr. Combs—he will [561] have to ask if a certain conversation was not had, or a certain statement made at a certain time and place, in the presence of certain parties, and then state what it is. That is the only way the court knows of doing it.

Mr. Combs: Mr. Marcus, as an officer of this court, is violating the rules of the court, unless you intent to prove by some witness that a certain conversation did take place.

Mr. Marcus: That is correct, and I am willing to go one step further with counsel, to show my good faith, if counsel will not object when the evidence does come in

(Testimony of Chandler P. Miller)

from the witness who will testify to it, I will not ask the question now. If that is agreeable to counsel.

Mr. Combs: Go ahead and ask the question, and let the court rule on the objection.

Q. By Mr. Marcus: Did you not tell Miss Olvera, at that time and place, that you were working with the Cristianis assisting them in their act that was being given in the other ring at the same time that Miss Olvera's act was given; that you did not see this accident at all, and that you would like to be of assistance to her, and you told her you had sent, with the other riggers, a telegram advising her to this effect, in April, 1939?

A. I said no such thing, no, sir.

Q. Isn't it a fact, Mr. Miller, that you did assist the Cristianis in the performance of their act at the time Miss Olvera's act was going on? [562]

A. I did not.

Q. Did you help her up on her trapeze?

The Court: Help whom?

Mr. Marcus: Miss Cristiani.

A. No, sir.

Q. Did you do anything in connection with her act?

A. Her act took place in the ring which I was in charge of, but her rigging was already set. It was not necessary for me to assist, because the rigging was got out and set already.

Q. You misunderstood the question. I asked if you had anything to do with her act; not the rigging.

A. Not the act.

Q. Did you have anything to do with her performance?

A. Not the performance.

(Testimony of Chandler P. Miller)

Q. Didn't you testify on direct examination that at the beginning of the act you went into the ring of the Cristianis?
A. I did not say that.

Q. And during the performance you came back from the Cristianis ring to the other performance ring?

A. I was not in either ring, for that matter.

Q. You were not in the ring where Miss Cristiani was?

A. Neither was I in the ring where Miss Olvera worked.

Q. Didn't you testify on direct examination that you left the ring after Miss Olvera started her performance?

A. The outer part of the ring, between the two rings, [563] was my station.

Q. You just stood there?

A. That was where I could observe both rings.

Q. You did not do anything but observe both rings?

A. Yes.

Q. During the performance?
A. Yes.

Q. And that is your testimony now?

A. That is my testimony.

Mr. Marcus: That is all.

Q. By Mr. Combs: Who supervised the guying out of the rigging at the beginning of this particular act?

A. Mr. Pollinger.

Q. By Mr. Marcus: How do you know Mr. Pollinger supervised it?
A. I saw him.

Q. What did you see him doing?

A. I saw him assisted by myself and different men with the guy line poles; indicating by his finger, pointing at a certain guy line.

(Testimony of Chandler P. Miller)

Q. He pointed to each guy line, like that (indicating)?

A. He did.

Q. Is that what you call supervising the erection of the rigging?

A. Supervising the guying out of the rigging.

Q. Then I presume, after watching him, standing there [564] between the two rings, you watched the men holding the net?

A. During the guying out of the rigging I was not standing between the two rings. I was behind the rigging.

Q. During the performance of Miss Olvera you did watch the men holding the net?

A. Yes, sir, I did.

Q. Did you see them move?

A. I saw one man move; the man who got hit by Miss Olvera.

Q. Did you see the net move?

A. A portion of the net moved with him.

Q. How far?

A. I couldn't say. That I don't know.

Q. You watched that? A. I did.

Q. How far did she fall from the ring itself?

A. She fell inside the ring.

Q. How far from it, I said.

A. From the inner portion of the ring?

Q. You know where the ring is? A. Yes.

Q. How far from that did she fall?

A. She was inside the ring a couple of feet; maybe three feet. I don't know; approximately that distance.

Q. That is your best estimate at this time?

A. Yes, sir. [565]

Q. How long was that net?

A. About 12 feet long.

(Testimony of Chandler P. Miller)

Q. About 12 feet long? Was it in the very center of the ring? A. Yes, sir, it was.

Q. Then it would be six feet each side of it, wouldn't it, from the center of the ring? A. Yes.

Q. She hit a man coming down? A. Yes.

Q. She fell, as you testified, a foot and a half or two feet from the net? A. Yes, sir.

Q. And you now state that she fell about how far from the ring itself?

A. I would say two feet; maybe three feet. I don't know exactly.

Q. How do you make that distance?

A. The distance from the center of the ring to the edge of the ring is 19 feet 4 inches.

Q. How far did the net go? That was only about six feet, I understood? A. That's right.

Q. She fell how far—about a foot and a half from the net; that would be $7\frac{1}{2}$ feet. $7\frac{1}{2}$ feet of 19 feet is how many feet?—that's about 12 feet, isn't it? Am I correct? [566] A. That's correct.

Q. Then you were just a little bit mistaken?

The Court: Don't answer that.

Q. By Mr. Marcus: Now, can you tell us where she fell, a little bit more accurately?

A. She fell beyond the net about a foot and a half.

Q. I mean from the ring itself.

Mr. Combs: I object to that as already having been asked and answered.

The Court: Sustained.

Mr. Marcus: That is all, Mr. Miller. Thank you.

Mr. Combs: We rest, your Honor.

(The court after admonishing the jury here took a short recess.) [567]

AMERICA OLVERA POLLINGER,

recalled in rebuttal, testified as follows:

(Stipulated that the jurors were present and in the box.)

Direct Examination

Q. By Mr. Marcus: Miss Olvera, I will show you Plaintiff's Exhibit No. 8 for identification, and ask you whether or not that is a fair representation of the main circus tent for the 1937 season?

Mr. Combs: I object to that upon the ground that no proper foundation has been laid.

The Court: Of what circus?

Mr. Marcus: Of the Barnes circus.

Mr. Combs: Same objection. One further comment: This is not a photograph; it is a rotogravure or printing of some sort.

The Court: I think you had better use the word "picture" instead of trying to tell what type of picture it is.

Mr. Marcus: Yes.

Q. Miss Olvera, is that a fair picture of the main Barnes tent for the season of 1937?

Mr. Combs: That is objected to upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid; and it calls for the conclusion of the witness.

The Court: Objection overruled. I think first you had better lay the foundation and ask her more about her observation of the outside of the tent. [568]

Q. By Mr. Marcus: Did you ever see the outside of the main circus tent, Miss Olvera? A. Yes, sir.

(Testimony of America Olvera Pollinger)

Q. How many times prior to the date of the accident?

A. The Al G. Barnes circus?

Q. Yes.

The Court: That is, during the season of 1937?

Mr. Marcus: Yes.

A. Every day when I came into the show grounds until I got the accident, sir, during the whole season, from March 22nd until September 13th or 12th.

Q. You saw the tent? A. Yes, sir.

Q. Every day? A. Every day, sir.

Q. Tell us whether or not that picture is a fair representation of the outside of the tent.

Mr. Combs: That is objected to as calling for the conclusion of the witness; no proper foundation laid; not a photograph; and there is no evidence here of when it was taken. It calls for the conclusion of the witness.

The Court: Overruled.

A. This is a view of the season 1937.

Q. By Mr. Marcus: Answer yes or no.

A. Yes, sir.

Mr. Marcus: I offer the picture in evidence. [569]

Mr. Combs: I object to the picture being received in evidence as incompetent, irrelevant and immaterial; no proper foundation laid for its introduction in evidence.

The Court: What is the materiality of it?

Mr. Marcus: The materiality of it is to show, in the first place, the bend in the tent, that is, the arch in the tent itself.

The Court: What is the importance of that?

(Testimony of America Olvera Pollinger)

Mr. Marcus: To show that the tent came down to where the trapeze was, so all these things were together up there.

Mr. Combs: I renew my objection to it.

The Court: I think the objection should be sustained.

Q. By Mr. Marcus: Miss Olvera, I will ask you whether or not this picture is a fair representation of the main tent—change that to photograph.

Mr. Combs: Same objection.

The Court: Overruled.

Q. By Mr. Marcus: For 1937, the year 1937.

A. Yes, sir. That is a picture of myself and Miss Jane Withers, the motion picture star.

Mr. Combs: That is objected to as incompetent, irrelevant and immaterial.

Mr. Marcus: It is just for the purpose of identifying the picture, counsel. No other purpose than that.

Mr. Combs: All right.

Mr. Marcus: I ask that this picture be admitted in [570] evidence.

Mr. Combs: I object to it as incompetent, irrelevant and immaterial; no proper foundation laid for its introduction in evidence.

The Court: It does not appear to be material to the court.

Q. By Mr. Marcus: Is that a fair representation of yourself prior to the date of the accident?

A. Yes, sir.

(Testimony of America Olvera Pollinger)

Mr. Combs: I object as incompetent, irrelevant and immaterial, and ask that the answer be stricken; it was made while I was objecting.

The Court: What is the purpose of that?

Mr. Marcus: In the first place, your Honor, to show her physical condition at the time; her appearance at the time. Secondly, to show the arch in the tent at the time, by this actual photograph.

Mr. Combs: I object to it on both grounds.

The Court: Sustained.

Q. By Mr. Marcus: Did you have a conversation with Mr. Chandler Miller in Los Angeles, in September of 1939? A. Yes, sir.

Q. Where did that conversation take place?

A. In the back grounds of the circus, right in the property men's wagon.

Q. Who was present at the time you had this conversation? [571]

A. There was Blackie Wallace and another property man, Huey, and Jack.

Q. Jack who?

A. Jack Lysaught, and other riggers; I never knew their names.

Q. What was your conversation at this time with Mr. Chandler Miller?

A. I went to say hello to them; first to Mr. Blackie Wallace. I say "Hello, Blackie"; he say, "Hello, Miss Olvera."

(Testimony of America Olvera Pollinger)

Mr. Combs: May we have just the conversation with Chandler Miller?

Q. By Mr. Marcus: Was this in the presence of Chandler Miller? A. Yes, sir.

Q. Relate the whole thing, please.

A. He told me "We glad to see you." Then Ringling was washing his face.

The Court: When you say Ringling—

A. I beg your pardon. I always knew him as Mr. Ringling. Miller.

Q. By Mr. Marcus: The man who just testified?

A. Yes, the man who just testified; he was washing his face. Then I told Blackie, "You sent me a telegram from New York"—

Mr. Combs: My objection is to a conversation with [572] anybody else. Just the Miller conversation.

The Court: The proper method—I will read this from 180 Cal., 539: "The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer in that the statement was made giving 'the circumstances or times, places and persons present'." [573]

Mr. Marcus: Go back to the question, please, Mr. Reporter, that I asked of Mr. Miller, and read it to this witness.

(Question read by the reporter as follows: "Did you not tell Miss Olvera at that time and place, that you were

(Testimony of America Olvera Pollinger)

working with the Cristianis, assisting them in their act that was being given in the other ring at the same time that Miss Olvera's act was given; that you did not see this act at all, and that you would like to be of assistance to her, and you told her you had sent, with the other riggers, a telegram advising her to this effect, in April, 1939?"

Q. Did you have such a conversation with him?

A. Yes, sir.

The Court: You will have to state the time, place and persons present.

Mr. Marcus: I thought we had given that, but if I haven't, I will ask the question again, your Honor.

Q. Miss Olvera, who was present at that time that you had this conversation with Chandler Miller?

A. There was Blackie Wallace, Huey, Jack Lysaught, and other boys there.

Q. What was the approximate date, to the best of your knowledge, at that time?

A. It was September 12, 1939.

Q. And where did the conversation take place?

A. In the back grounds of the circus at Exposition and [574] Washington Boulevards.

Q. What fixes that date in your mind?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Marcus: Did your husband on this particular date, September 12, go out into the ring before you did?

(Testimony of America Olvera Pollinger)

The Court: You have spoken only of September 12th.

Mr. Marcus: September 12, 1937, the date of the accident.

The Court: Reframe your question.

Q. By Mr. Marcus: Did your husband go out into the ring ahead of you on September 12, 1937?

Mr. Combs: I object to that as incompetent, irrelevant and immaterial, and not proper rebuttal; it calls for the conclusion of the witness.

Mr. Marcus: One of the witnesses in the deposition testified that he came out first, and was out there and supervised the erection of that rigging.

The Court: Mr. Marcus, as I recall the testimony, it would not be rebuttal. I think she testified to this on direct examination, did she not?

Mr. Marcus: She so testified, your Honor. I am just rebutting the testimony they introduced.

The Court: It is not necessary to rebut it under such circumstances.

Mr. Marcus: Very well. You may cross examine.
[575]

Mr. Combs: No cross examination.

KARL POLLINGER,

recalled as a witness in rebuttal, testified as follows:

Direct Examination

Q. By Mr. Marcus: Were you present with your wife on September 12, 1939 at Exposition Boulevard?

A. Yes, sir.

Q. At the time she had a conversation with Chandler Miller?

A. Yes, sir.

Mr. Marcus: That is all. You may cross examine.

Mr. Combs: No cross examination.

Mr. Marcus: That is all. We rest, your Honor.

Mr. Combs: The defendants rest.

(The court after admonishing the jury excused them until 1:30 o'clock p. m.)

(Proceedings had without the presence of the jury):

Mr. Combs: I will hand the court a written motion for a directed verdict, and I have an extra copy for the file.

The Court: Let me read the motion. I have read it, Mr. Combs.

(The following is a copy of said written motion for a directed verdict): [576]

In the United States District Court in and for the
Southern District of California
Central Division

No. 8367-B

AMERICA OLVERA, etc.,

Plaintiff,

vs.

AL G. BARNES INC., a corpora-
tion, et al,

Defendants.

MOTION FOR DIRECTED VERDICT.

Come now defendants, by Combs & Murphine, their attorneys, and hereby move the Court to direct a verdict in favor of defendants and against plaintiff herein on the following grounds and for the following reasons:

I.

That the contract sued upon in this case is a contract made under the laws of the State of Florida and contains a clause releasing defendants of any contracting parties from any liability for damages which might have occurred to any participants under the contract, and in this connection further call the Court's attention to the fact that there is no evidence of gross negligence in this case and none has been proven by plaintiff herein, and no facts or circumstances have been shown or proven constituting a release or waiver from the release clause contained in plaintiff's [577] contract, plaintiff's Exhibit No. 1 in this action, and that the same is of binding force and effect upon plaintiff and bars and prohibits her recovery in this action.

II.

Upon the ground that there has been no evidence whatsoever of any kind or nature produced to the effect that Ringling Bros.-Barnum & Bailey Combined Shows, Inc. were the employers or that plaintiff worked for Ringling Bros. at the time the accident in this case occurred, and further that there is no evidence in any way linking or tying up Ringling Bros. to the negligence claimed and alleged in this action by plaintiff herein as having occurred to her on the date of the accident, which occurred at Anthony, Kansas, September 12, 1937, or at all; that there is no evidence whatsoever in this action that Ringling Bros. controlled or regulated the conduct and operation of the Al G. Barnes Show at Anthony, Kansas, on September 12, 1937, or in any manner whatsoever; that there is evidence to the effect that Ringling Bros. and Al G. Barnes are separate corporate entities under separate management and control.

III.

Upon the further grounds that the injuries suffered by the plaintiff in this action were the result, if at all, by the contributory negligence as a matter of law of herself and of her agents, including her husband, Karl Pollinger, in the management, operation, and use of her trapeze equipment. [578]

IV.

That the injury suffered by plaintiff in this action has been conclusively proven and shown to have arisen from the negligence if there was any negligence at all, of fellow servants of plaintiff engaged in the production of an enterprise on behalf of defendant Al G. Barnes Show, together with the fact that plaintiff was an independent contractor,

does not relieve her from the law of Kansas providing that her employer is not liable for injuries occurring to her through the negligent act of her fellow servants.

V.

That the injuries in this matter were the result of a course of action adopted by plaintiff with full knowledge of the nature and character of her act and by her as an experienced, mature person cognizant thereof and of the risks and hazards in connection therewith, and that she assumed all the risks and hazards of her employment. In this connection:

(a) That she assumed the risks and hazards of her employment and her act as a trapeze artist in general;

(b) That if there are any general risks occurring as the result of the operation and management of her equipment by the defendants, she assumed the risk and hazard of such additional risks, if any there were, and knew about them and in that connection she knew about the risks and hazards of falling beyond a net used and employed and held directly [579] under her trapeze for the purpose of catching her in the event she fell, if such were the fact.

(c) That the claim is barred by the statute of limitations.

(d) No gross negligence and no wanton or willful misconduct has been proven and the contract releases defendants of any liability.

We respectfully urge the Court that on each and all of the foregoing grounds the Court should direct a verdict in favor of defendants in this action.

COMBS & MURPHINE,

By Lee Combs,

Attorneys for Defendants.

Mr. Combs: By way of supplement—and I will ask the reporter to take all this, although some of it appears to be argument, because it contains grounds of motion—by way of supplement of the written motion which I understand the court to have read, I would add that in this case there can be no question but what the absolute minimum requirement on the part of plaintiff to prove in order to establish a case of liability against the defendants, or either of them, is gross negligence.

The evidence shows—I am summarizing very briefly, because I believe the court is familiar with the evidence, and I don't want to take up any more time than is necessary—[580] that the negligence claimed, or complained of, could have occurred only in two spots: The management and operation of the net, and the erection of the trapeze. On the subject of both of these matters the evidence is uncontradicted to the effect that both were conducted and handled in the same manner that they had been handled all season, and that there had been nothing unsatisfactory about the manner in which either of these items had been handled prior to the afternoon of the day of Miss Olvera's fall. The testimony being thus it is evident that these defendants conducted themselves in a manner which business men would logically and intelligently conduct themselves in connection with a matter involving the due course of their business. For a charge to be made on the basis of that factual background, that in this particular case they were guilty of gross negligence, we think to be so untenable as to constitute a fantasy.

I won't go into improbabilities; I won't even say possibilities, as a mathematical calculation of this accident to have occurred, as Miss Olvera claims it did. I think that is so conclusive that in itself it warrants a directed verdict.

In connection with the last point in my memorandum, I will comment that there would have to be a wanton or willful disregard of the rights of this plaintiff, or the safety of her welfare, to entitle any recovery. In my opinion, however, in a case of this nature, gross negligence, to be [581] gross negligence, would have to be a willful and intentional deliberate, wrongful act, and an act which was so shamefully wrong on the face of it that it would constitute that.

We respectfully submit this case falls so far short of any such act that, in our judgment, there can be no doubt, in a reasonable mind, as to the course of conduct. We don't believe there is any negligence at all established in this case, much less gross negligence. Certainly not gross negligence. The contract itself is a valid, binding, enforceable contract, your Honor. It provides certain specific things, among which, she assumes the risks and hazards, and she contracts away the defendants' liability for negligent acts.

She knew the nature of the occupation she was undertaking, and had engaged in it for a great many years, and it was her responsibility, not the defendants. Naturally, we regret she had an accident, but, unfortunately, our stockholders and our due management require, just because a person has an accident, we do not pay out large sums from the company's coffers. It would not be just or right to do that. Therefore, in this case, because she has no legal right, we respectfully submit the motion for a directed verdict should be granted on all the grounds stated in the motion, and on the additional grounds stated in this oral argument.

I don't believe it will be necessary, if your Honor is agreeable, and counsel is agreeable, for me to read all of

[582] this written motion, if it may be stipulated to be deemed read.

The Court: It may be filed.

Mr. Combs: All right, we will file it.

Mr. Marcus: I am not going to take very much time to reply to counsel. Counsel at the beginning of his dissertation advised your Honor there was no contradiction as to the effect that the rigging had always been erected satisfactorily, and that there had been no difficulty prior to the time Miss Olvera was injured, on September 12, 1937.

I don't know whether counsel purposely forgets these things, or whether it is just done in the heat of discussion; but I wonder if he remembers the time Mr. Pollinger testified to the instance when the stake in the ground came out, and he advised them at the time that the rigging had not been set up properly, and the guy ropes had not been set up properly. Miss Olvera testified that on three different occasions she had to come down off of the trapeze because it was not set up properly; that the lines were crossed. Do you remember that now, Mr. Combs?

Mr. Combs: No, I don't.

Mr. Marcus: Look at the transcript. Counsel says there is no legal right for her claim of action, because there is no basis established by the evidence, or otherwise, that they were guilty of gross negligence. Well, apparently counsel does not agree with two judges of the Ninth Circuit. [583] They said there was evidence from which the jury might infer, and could infer, that the defendants were guilty of gross negligence; and I believe, at least so far as this case is concerned, that the law has been established, and that we are bound to follow that law.

Counsel says there is no negligence at all, in his opinion; that Miss Olvera assumed the risks and hazards of the

employment. Sure she did, but she certainly did not assume the risks and hazards of the gross negligence of the employees of the circus.

The testimony at this time, your Honor, certainly is not a fantasy, as counsel calls it. This woman, walking around on crutches for the past seven years, and probably the rest of her life, is not going through a fantasy, and her claim is predicated upon a legal right, a right that has been established by law now as the law of this case; that if this jury should believe that the employees of the circus, in the erection and maintenance of that rigging, and in the operation of that net, were grossly negligent—and I can't see how they can possibly come to any other conclusion, because to see something, and to fail to do something under those circumstances that call for the utmost degree of cooperation, the utmost degree of care,—and to fail to do something under those circumstances, where a person's life is at stake, and they knowing that the net is there for the purpose of catching her in safety when she fell, and they [584] failed to move, to my mind that even goes further than gross negligence. It means they willfully disregarded the safety and the life of another, because her life was in danger if she fell.

I say there is no merit to this motion to dismiss at this time, your Honor. We are here to adjudicate her legal rights. It is no fantasy. I respectfully submit that this motion should be denied.

Mr. Combs: No further argument, your Honor.

The Court: The motion will be denied. The court will recess until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p. m. of the same day.) [585]

AFTERNOON SESSION
1:30 o'CLOCK.

The Court: I think I may state that the attorneys representing the parties have agreed informally that that part of Rule 51 which states that the court shall inform counsel of his proposed action upon requests prior to the arguments to the jury, will be waived, and that the parties may make their objections to the instructions after the jury has been instructed and retires, and that it shall be deemed that such objections were made before the arguments.

Mr. Combs: We so stipulate.

Mr. Marcus: That's right.

The Court: That is what you did before.

Mr. Combs: Yes. I suppose that will include the refusal to give requested instructions, as well as the giving of the actual instructions.

The Court: You may include anything you want.

Mr. Combs: May it be stipulated that Defendants' Exhibit B, which is the blackboard, be received in evidence, however, with the proviso that a photographic copy may be substituted in lieu of the blackboard itself, as soon as that has been completed by the photographer.

Mr. Marcus: So stipulated.

The Court: You agree that the arguments may be limited to one hour on each side? [586]

Mr. Marcus: So stipulated.

Mr. Combs: Yes.

The Court: The members of the jury are all present, so stipulated?

Mr. Combs: So stipulated.

Mr. Marcus: So stipulated, your Honor. [587]

ARGUMENT BY MR. MARCUS

Mr. Marcus: Gentlemen of the jury; I don't think it is fitting or proper for me at this time, in the light of the evidence, to unduly trespass upon your time at this stage of the proceedings. I am going to attempt in this argument to give a very brief review of the evidence, and will attempt to do so in a most fair and impartial manner. It is counsel's duty, as an attorney and as a member of the bar, to assist the jury in arriving at a fair and impartial verdict. Argument by counsel, no matter how convincing or able it may be, whether it come from counsel advocating the cause of the plaintiff in this matter, or whether it comes from most able counsel representing the defendants in this case, is not evidence in the case. We must approach a discussion of this evidence viewed in the light as we have heard it from the witnesses who have testified in this case, because the jurors who have been called upon to decide the facts in this case are the ones to pass upon the evidence introduced in this trial. That is not a province of the court; it is not a province of counsel, but it is a God-given right as free Americans to have a jury pass upon the facts.

Now, in approaching a discussion of this evidence the jurors are the ones who pass upon the weight and credibility of the witnesses who have testified in the case. That is your province; your duty; and your right. You have heard [588] the witnesses who have testified here. You observed their conduct on the witness stand. It is your duty, in passing upon the weight of their testimony, upon their credibility as witnesses, to examine their testimony, to watch their demeanor on the witness stand; whether they were willing witnesses; whether they were reticent about their answers; whether they volunteered their state-

ments; whether they propounded more than they actually knew. Those are things that are exclusively the province of this jury; and if you believe—and the court, I believe, will so instruct you—that if a witness has willfully sworn falsely to one material fact you can disregard all of that witness' testimony.

In the light of these preliminary remarks I am going, not to approach our side of the case, because you have heard most of our witnesses here; you have observed their conduct on the witness stand, and I presume that you are able to pass upon their credibility very easily.

I will start in first with the testimony of that most gracious witness, Mr. Chandler Miller. He is a man that came here from New York, brought here presumably by the circus to testify in this case; a man who happened to know, or happened to remember, everything in detail—and I mean in detail—that happened approximately seven years ago. But listen to this: Evidently he must have discussed this case with someone; evidently he must have had his memory refreshed, or at least you may, by reasonable inference, deduce that his memory was refreshed by someone; but he only [589] remembered as to the details of the accident; only with reference to the details concerning how the accident happened. That he remembered in the minutest detail. But knowing these witnesses sometimes, in the light of cross examination, can oftentimes display their true intentions, in their true light, their bias and their prejudice, under the searching light at least of cross-examination, that is given to us under the law,—to me it was most significant that he can remember everything; the hour; the manner; the minutest details; but when he is asked: Mr. Miller, what town did this happen in? He could not even tell you that. Certainly that would

the most benefit to those by whom he could benefit from, he would have remembered above all,—is where the accident happened. That would have been more important, more significant, than to remember that there were six wires, or eight wires, or twelve wires, and so forth.

Do you know where you were the day before? Do you know where you were the day afterwards? And what was his answer? I don't remember. That is most significant. It illustrates quite vividly that he was attempting to be of the most benefit to those by whom he could benefit from, and certainly it was not Miss Olvera. It was the circus that brought him here from New York and placed him on the witness stand to testify in their behalf. When he got down off the witness stand, and he began to draw these drawings you noted his fairness in the matter, and his unprejudice in the matter. [590] Oh, he was a swell witness, and an intelligent one to start, until he was confronted and carried to the extent that he could not get out of some of these things. He was brought down here, and he made a drawing over here. He could see everything that was up there, that was 45 or 50 feet up in the air—anyway, 42 feet in the air, and he would lead the jury to believe that he could see those things up there, because what was there was only a trapeze. That was not being fair to Miss Olvera. A witness has got to be fair to both sides, and if there is any failure to disclose what was within his knowledge, or failure to produce the evidence which was within their knowledge, certainly they have, to my mind, at least failed to do their duty both to the plaintiff and to the defendants, because they harm their own case by that conduct.

When he was called down here he was asked if that was a fair representation of the conditions existing within that

ring and within that tent at the particular time and place, and he said yes. Now, that was not true. Then he was brought down and asked to put in the other trapeze. He was reluctant to do these things. Do you remember, when he went to discuss the matter of these ropes up here, how many times he had to be asked the question, and finally he admitted that there were many ropes up there in addition to them, approximately ten more ropes up there, which held the tent up on the inside, and then would go out to the outer end of it, but [591] he attempted to tell you that the conditions that he said existed there, and the reasons why he could tell you what the conditions were at the time was because it would appear there was only one little trapeze up there, and for that reason he could see it all. But when you put in all the rest of these wires, the trapeze, the blocks and tackles, and ropes, and guy lines, it doesn't become so easy after all. Finally he said he couldn't possibly put in the ropes that belonged there. **That** is just one illustration of one of their witnesses. Let us go on to another one.

There were several depositions read to you from witnesses who were back east, three of them, if I remember correctly. I am going to designate those gentlemen as the three wise men from the east, because they saw and heard all, and knew all. You know, there is an engraving across the front of our Hall of Justice, not very many feet from this building, which says that he who violates his oath desecrates the divinity of truth itself.

Now, how apropos is that to this case. These depositions are in evidence here, the originals of them. We read them out of the transcript. Gentlemen, it would have to be an insult to your intelligence to believe that a man would take a witness stand—and that, after all, is what

these witnesses did, although their depositions were taken—would sit there on the witness stand, under oath, and recite for a page and a half, and to the minutest detail, the rigging, the [592] apparatus and size of it, without a grammatical mistake. Not once. Why, it became so obvious it was ridiculous to hear the wording of those depositions. I only wish they were brought here, so that we could have had at least some opportunity to examine them on the witness stand. I would like to know what these witnesses would have said, if they were asked these questions, because you know, when the depositions were taken in New York, counsel was not present. They were submitted upon written interrogatories. That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as was the case in this matter, of the plaintiff being represented by counsel. And we would have liked, under the circumstances, to have had the witness here, and to have asked him this question: How is it that some four or five different times in this deposition you testified word for word, line for line, paragraph for paragraph, and dimension for dimension, for over a page and a half of your deposition? Doesn't that seem obvious? What conclusion can any reasonable or intelligent man come to but that that man violated his oath, when he took his oath to tell the truth in the case? Certainly, by no stretch of the imagination, could he have sat there and for a page and a half answered a question as he did. If there is any doubt in your minds about it, you will read it from the record.

Then another one of these witnesses, one of these men [593] from the east, he also said: I supervised the erection—and then it went on identically, answering in the

minutest detail question after question, and not one grammatical mistake. How do you account for that? There is only one way to account for it, and I will leave it to you jurors to determine that. Certainly nobody is going to answer the questions that way. Was the defense truthful? Was the defense honest?

Mr. George Williamson, one of the witnesses whose deposition was read, said what? Chandler Miller handled the rigging. Mr. Miller, when asked that, said: I didn't handle the rigging. Mr. George Williamson said: I supervised the erection of the rigging in the morning. In the afternoon, Mr. Miller said: I supervised the erection and inspection of the rigging in the morning. Do you remember how many times I read it out of his deposition? Seven different times, until I was stopped by the court; and there was some more on top of it. Now, what does Mr. Howard Mentz say—the one, you will remember, whose deposition was read; the one who had a broken leg. He said he had a broken leg, and he was not there at the time. He gave a minute description of the apparatus, of how the act was performed, and what was done with Miss Olvera later in the proceedings; and he ends up by saying that he tried to do everything possible for her, but it was useless, so he went home. There is so much discrepancy in these depositions [594] that it would be useless to attempt to reconcile them. It is obviously an out and out violation of their oaths.

Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olvera.

Mr. Combs: We respectfully submit that is a prejudicial, unfair and unjust comment, that this corporation waxes rich on the exploitation of performers.

Mr. Marcus: I did not say "exploitation."

The Court: Read it.

(Record read by the reporter.)

The Court: I think that is inappropriate. Motion granted.

Mr. Combs: May the jury be instructed to disregard it?

The Court: The jury is instructed to disregard that statement.

Mr. Marcus: Here was a contract given to her on the 24th of September, 1936. I have got the exhibit in my hand. You see it is printed. This is a printed contract that was given to her by Ringling Bros. Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it. Miss Olvera agreed to go to work for them under this contract for the sum of \$80.00 per week. In addition to that [595] she was to get her lodging, her transportation and food.

They attempted by this agreement to release themselves from all responsibility, be it for their negligence, gross negligence or willful misconduct, whatever you want, but, fortunately, that is not the law of this State, that a corporation can release themselves from their own gross negligence. Not yet; even though they attempted to do it. You can see by reading this contract how favorable this was to the defendants in this case, and how unfavorable it was to the person who undertakes to render services under it. It's furnished to them; it's given to them, and they are told to put their signature to it, and that's that.

Now, what do we have here? We have a situation where the circus, through its employees, erected the rigging; something went wrong with it; Miss Olvera was thrown from the trapeze. Now, the most important part I think about this matter is, how she fell. What was the cause of the fall is something of not particular importance; but the importance is this: They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net? Was it to catch her in safety?—Yes. Now, was that done in this case? No. Did any of the witnesses testify that the net was moved or attempted to be moved in any particular? Only Mr. Miller. He said the man who got hurt moved about a foot. [596] Well, I guess he tried to get out of the way. That's the reason for his moving. It was a good thing she did not strike somebody else. The rest of them might have moved at least; but can you imagine—every witness testified she fell from a foot and a half to two feet of the net, and they weren't even in a position, they weren't even in that situation where they could have moved just a little foot, and have saved this woman a lifetime of misery.

After all, if that isn't gross negligence, there isn't a case of gross negligence that I ever heard of. After all, gentlemen, as the court will instruct you as a matter of law, negligence is a relative term. What might be negligence in one instance would not be negligence in another instance, because negligence, or gross negligence, as the case may be, is dependent upon time, place and circumstances. Where the danger to be avoided is great, then the care to be exercised is correspondingly great. Here this lady was performing upon a trapeze. She was flying

up in the air, so that a slip, or some maladjustment or some difficulty with the trapeze would mean possibly her life. Then the danger involved was great, and the corresponding duty would have to be great; and in order to constitute gross negligence in that particular instance is a lot different than negligence or gross negligence in another instance, where a person's life is not at stake, or where the great danger to be avoided is not as serious, or as difficult as it is in this particular case. [597]

I believe that Mr. Cronin was a very honest witness. Do you remember his saying that they have so much difficulty with their prop men and riggers, and men employed as laborers; they come and go all the time, and I believe you gentlemen remember that. But what do we have? We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That's why I think you got the truth from this man. One was a person who, at the time his deposition was taken, was in their employ, working for them at the time.

Mr. Combs: Excuse me for another interruption. The statement made by counsel is untrue. Williamson was not in the employ of the company at the time he gave his deposition. The deposition so shows. I regret the interruption. I request that the jury be instructed to disregard that.

Mr. Marcus: If he was not employed, I will withdraw it with respect to that.

The Court: The jurors will be instructed not to consider it.

Mr. Marcus: Now, gentlemen, I only have a few minutes time on the matter of this argument. Here is a lady that has given the best part of her life to the rendition of her services for this company. I don't know whether any of you gentlemen have appeared in public. I don't know what your experience has been in so far as trying to please the public. [598] But I will venture to say that you know that if you die in the end it's not appreciated. You give the best that's in you. You give your life, or your services, and what do you get in the end? Probably just an empty life.

What happened in this case? The evidence is uncontradicted that this lady worked from the year 1933, through part of the season of 1937, until she was injured, rendering her services under the Ringling contract, for a show which they placed her in. She suffered a most serious injury; something that took away from her for the rest of her life the ability to do that for which she had been trained from childhood. Then after getting out of the hospital, you can imagine what effort she made, with a broken back, lying on splints, in agony and pain, traveling about with that circus.

You will remember Dr. Hugo Kersten—by the way, he was called by the defendants to examine her. He did not have an opportunity of examining these X-rays until he came to court, to express an opinion, until such examination was made. He examined these X-rays while he was on the witness stand. What did he say about her condi-

tion? I could not have gotten a better witness if I had called him myself. He gave a true picture of the woman's condition. She will never be able to work in the circus again, or do her act again. But what happened when she went to ask Mr. Pat Valdo, and walked in on her crutches? She was broken in body, and probably in spirit. If not then, surely now. What happened? [599] Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn't. It was rather amusing when counsel was examining Dr. Kersten. He said: Supposing this operation had been done before? And do you know what that operation meant? Opening up the back, taking the spine and cutting part of the crushed vertebrae in an attempt to fuse them one to another; being in the hospital for months and months. It takes an expert to do a thing like that, and they don't do these operations for buttons or chalk, yet, that I know of.

She traveled around with that circus all the time. Was any effort made by them to assist her, so that she could get these things? You can answer that, if you want to. They said: You will have to work for it. And that's what happened in this case.

Gentlemen, you have probably reached the conclusion that there was a previous trial in this case; and there was. It's in the record. And there is another trial now; and don't you think we don't have to do everything in our power, our legal power, to convince this circus here that

they ought to take care of people who have rendered their services to them, and have given of their life. At least, so far as this little lady is concerned, she has given everything that is dear to her, and these people say they don't have to be [600] responsible for her condition.

Now, I say to Miss America Olvera, that I think these men on the jury realize your condition. I think they know what you have gone through for the past seven years, and I know, and I feel down in my heart, that this jury will not let her down. She has asked here for \$50,000. That is the amount of the prayer. She was earning \$80 per week, and in addition to that she was given her lodging; she was given her transportation. In addition to that, during the summer months when she was not employed by the circus, she earned other sums working all over Europe, all over Mexico. She was a premiere performer of the world. Conservatively speaking, her income was at least \$100 a week. That's \$400 a month. That's \$4800 a year. It has been seven years since she has done any work, approximately. Those are her special damages. If she is entitled to a dime she is entitled to that.

In addition to that the court will instruct you that she is entitled to be paid for her pain and suffering in dollars and cents. I don't think that the prayer for \$50,000, in this case, is excessive at all in the light of these circumstances.

Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client.
[601]

ARGUMENT BY MR. COMBS

Mr. Combs: I don't feel that I stand here in a position of an individual representing several other individuals, in which position I should be subjected to excoriating criticisms on various matters totally disconnected, gentlemen of the jury, with the facts and the law in this case. Therefore, with the utmost sincerity, gentlemen of the jury, I approach this argument, particularly in the light of the opening argument, with a sense perhaps of outraged dignity.

Counsel opened his argument with a tirade against witnesses, and I might add in this case only three or four were selected out of a group of more than twice that number. When you gentlemen undertook the responsibility of deciding this case, which you undertook as fine citizens, you did so with the assurance, and with your avowed and determined intention to do exactly that, that this case would be decided without the influence of emotion or emotional factors. Let me say, gentlemen of the jury, you are to remember in this connection you are dealing with two—the plaintiff and the plaintiff's husband—clever actors; actors who were able to hold spellbound a tent of ten thousand people or more, in their performances. Don't think they are not asserting and using and exercising that peculiar ability of theirs to the extreme in this case. I ask your indulgence for these men, who less capable and able along the [602] same lines, are only able to present my client's cause in a humdrum manner; yet they have presented it true and fair and fine. Be fair, gentlemen of the jury; then decide the case on the evidence and the law as I know you will.

Briefly, on the subject of damages, there is a slight perversion of the testimony of Dr. Kersten. What Dr. Ker-

sten said was, had this woman been placed in a proper cast—and I know that cast, for I have seen it in my own family, where two or three of the vertebrae of the back were crushed, they have been completely mended—but she elected of her own motion—you will remember that question on that subject—to return to the circus to follow the glamour of the circus.

I admit they love the circus business, because it is glamorous, and they love the applause they receive, and there were other reasons she elected to return to the circus. It was not a responsibility of ours to do this, but if it were our responsibility, let me assure you gentlemen of the jury, that this gentleman representing Miss Olvera would have been the first to say so. In other words, the argument would have been exactly the reverse; we would have been damned for doing what we are attempted to be damned for not doing.

That brings me to counsel's comment respecting the evidence of several deposition witnesses for the defendants. First, he made another error, which I did not cite at the time, stating there were three depositions read. There were [603] only two. The third one was here, and was caled, and that was Chandler Miller. Counsel had his deposition before him, with 100 questions, and he unsuccessfully endeavored to impeach his testimony. Let me ask you, gentlemen, how well that man told the truth in 1940, in relating events which occurred a couple of years before he gave his deposition, how much more difficult was it for him to testify, relating the events in person on the witness stand, under those trying circumstances, knowing counsel had the transcript before him, eager to grab any chance to impeach the integrity of his words—as to whether that man told the truth, I will let you be the judges.

In that same vein counsel charges these witnesses with having given identical answers to questions, and then shifts over rapidly and charges them with inconsistencies and irregularities, and he made the charge against these honorable men, entirely unsupported by any evidence, that they deliberately committed the crime of perjury, and falsely testified under oath; and in support of his contention he cited the beautiful motto that graces our Hall of Justice. I am happy to say, in the course of my argument, I am never going to say that any person took the stand and deliberately told an untruth. I will point out inconsistencies, but I will never charge a person with having committed such a crime so glibly.

Naturally, rigging men would know rigging, would know [604] every eye, block or tackle, would know them a lot better than they would know the towns they went through. So far as Chandler Miller is concerned, he was asked questions spontaneously, and could not have prepared any dimensions of the tent, and other dimensions. Counsel tried bitterly and hard to break that witness' testimony. He never affected its integrity, its truth or veracity; and if we had no other witness than his own testimony, it would be convincing; but we do have some six or eight others. I will ask you if anyone could ever charge Chandler Miller with being suave. If ever a man was not suave, there was one. I don't know of anybody around the circus who is suave, unless it be the performers, or unless it be the one who barks out in front, commonly called a barker. Sometimes he is suave. Chandler Miller was not suave. Counsel says he is biased. His bias, I take it, consists of the fact that he was a responsible enough citizen to do approximately what you gentlemen are doing here today. You have devoted very

largely of your time. He has devoted of his business. He had to come from New Jersey. Every person is happy to discharge his duty, whether as a juror or as a witness. That is what Chandler Miller did. He is not employed now by the circus. He has not been for a long time.

I might say this contract, gentlemen of the jury—the contract in this case, defines the relations and the rights of the parties, and it has been so held, and I believe the [605] court will instruct you, that this contract is a valid, binding, enforceable contract. The parties had a right to such a contract, and they did so in the due course of their business, both of them knowing all the phases of their business that required attention. Neither party had to sign the contract. It was of their own free will and volition, and it was done with a consideration, and the terms and conditions of that contract clarify and conclusively establish the relations of the parties in this case. I might add, gentlemen of the jury, when you get to the jury room you may take that contract with you, if you please, as well as all the exhibits; and I know a study of it will give you an answer to this case. It will give you an answer to this case, gentlemen of the jury. I want to read a few portions of it. Clause 8:

“The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the ‘act’ by reason of the Artist’s skill constitutes a ‘feature’ performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

“* * * The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe.”

Let me call your attention in that connection, gentlemen [606] of the jury, that the testimony regarding Pollinger himself, the testimony of not one, but several reputable, unimpeached witnesses in this case, including Miller, who was here before us, was to the effect that Pollinger supervised the guying out of that rigging on the very day of the accident. I noticed that counsel did not touch on that in his opening argument; that the so-called tangled-up 8-hook—I presume he will return to that subject, I now having brought it up, in his reply argument; but on the subject of the rigging itself, the testimony to our mind, by the unbiased witnesses in this case, is unimpeached, to the effect that Pollinger supervised the erection of that rigging on that day, just exactly as Miss Olvera's contract provided, and just as he did in the due management of this business, in the due course of the business, over these months from March until the time of this accident. I will come back to the subject of that so-called tangled-up condition of the guy wires, or rather of the falls and the 8-hooks, in a minute. I want now, however, to read another portion of the contract, while we are on it, and I will try to deal with all the parts of the contract at one time, that I intend to mention.

“That the Artist in accepting from the Show meals, car-lodgings and transportation on its circus train, receives special benefits of recognized value to the Artist, and that such special benefits constitute consideration to the Artist for his release for claim for damage of every nature and [607] description that he may have during or after the period of performance, under this contract, against all transporting railroads and the Show.”

The Show being the defendants in this case.

"Now, therefore, for valuable consideration the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants, and any transporting railroad company handling the Show's circus train movements, of and from all claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the persons and/or property of the Artist in any transaction whatsoever during period of performance under this contract; and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

Gentlemen, the law of this case, as the court will give it to you, is that there cannot be any recovery in this case if the defendants were only negligent. It would have to be a gross negligence, and that means, gentlemen of the jury, just what it says. It means something far beyond ordinary negligence of the house and garden variety that we hear of from day to day, such as that where automobiles have a collision. This must be gross negligence, and gross negligence means simply this: That there must have been a [608] disregard for the rights of others, a conscious doing of a thing, or failing to do a thing, that could not have but one result; something tantamount to willful, deliberate or intentional wrong to another. That is what that means.

Can you find a single thing in the testimony in this record indicating any such attitude or conduct on the part of these people? There isn't one single one of these riggers that would not have broken his neck to catch Olvera, if he could. The very fallacy in that regard ap-

pears from the fact that counsel argues that this man who was hit must have tried to get out of the way. I guess he did, but he couldn't make it. Isn't that the answer? But back to the subject of gross negligence. These people did not do anything like that for this woman. They did not want to hurt her, nor did they omit doing things, in an intentional manner, that would tend to bring about such result. Indeed not. Quite to the contrary. If there were any responsibility for their checking up the equipment in connection with the figure 8 hook situation, it was in the light of the fact that Pollinger was the man who did it. He saw the last set-up, and failed to see if anything was wrong. I don't believe there was anything wrong with it, gentlemen of the jury.

There wasn't even ordinary negligence. And Mrs. Pollinger, the plaintiff, in response to a question on direct examination, whether or not the apparatus was located [609] in exactly the same manner at Anthony, Kansas, as on the six months preceding the 12th of September, when the show was being put on, she said yes. Likewise, a similar question respecting the net, and a similar answer. Can you gather any inference of gross negligence from that? You can't gather any inference of negligence. The fact that she fell on the 12th of September did not alter the fact that the show company operated in a legitimate and lawful manner, free entirely from anything that could be claimed as gross negligence; in fact, free from any negligence at all.

Miss Olvera, when she undertook her contract with these show people, was very familiar with the whole business. She knew all of the risks, dangers, and hazards; and they would not have wanted a single performer, for any of their shows, who did not have such a contract.

That was the whole matter; the whole situation, and these gentlemen, in operating their business, with those hazards, gentlemen of the jury, multiplied by better than a hundred times, involving the number of performers they had, could not possibly make a contract other than like the one they had here. They would be out of business before they were in. Two or three accidents would lick them.

The performer comes to the employer and says: I want this job, and I am good at it. The employer says back: Will you take all the risks? We can't afford to take you [610] unless you do. It would lick us in to time, unless you did. She says: Yes, I will, and she signs the contract. Aside from the resume I have just made, of what is the custom or manner of conducting that business, she goes further and recites: "That the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

Gentlemen of the jury, remember this is not a master and servant case. This woman was an independent contractor, and that, under the law, implies that she had full control and direction of the means and manner of operating her act. We have no right to step in and say: You do this, that, and the other thing. This is different than in the case of a master and servant. We have no direction or control over her, to tell her that at a certain point she should put her hands out one way or another way. That was entirely hers; and she was mighty clever at it, too. The show did not take any responsibility other than that described in this sacred document, that is the basis of the relationship of the parties. It could not be otherwise. The law so recognizes it, and the court will instruct you on that subject.

An independent contractee only owes that duty to the independent contractor to refrain from occasioning some defect that is known to him or it, that is not known to the independent contractor. That is the extent of the duty. [611] There was not a single thing we knew about. She wanted to use the net she asked for; that was the net she used for months, in exactly the manner she directed. What else could we have done? Not a single thing, gentlemen of the jury.

We have not been guilty of any negligence, much less that kind of negligence; and to place the finger of shame on us gross misconduct so bad that it was flagrant, or something more or less disgraceful—there was nothing of that kind. We acted at all times during this entire season, and during the afternoon in question in this matter, as an ordinarily reasonable, prudent business man would operate in operating that kind of a show. The best indication of that is the fact that the Barnes circus is one of the big circuses of this country, enjoying an important part in the history of this country; a show business headed by honorable men, not to be shamed and disgraced by suddenly being informed that they grossly and negligently conducted their business, which they had been conducting for 50 or 75 years. I claim it is not fair; it is not just; it is not right; it is not true.

Regarding the figure 8 hook situation, we sincerely submit to you gentlemen that Miss Olvera is mistaken as to what she saw when she looked up. She is the only witness in the entire case who has testified positively as to what happened, and she did so at the very instant she claims to have taken in this picture—at the very instant when she was faced with a prospect, in fact, the reality of a fall, [612] because it was at the instant she says she looked

up to get a fixed point on the crane bar she saw the hook tangled up by the clevis and the figure 8 hook, and at that instant it came down, and she fell.

Let us look at that situation, and I submit, gentlemen of the jury, that you consider your knowledge of elementary physics in considering this point. This figure 8 hook at the left, as we face Defendants' Exhibit B, is claimed to have been tangled up. That raised the line approximately two inches, according to the testimony, the line that fell down to the trapeze bar. Miss Olvera and Pollinger were positive on the subject that the trapeze bar was level. I believe the reason that it was level was because it was not tangled up. But it was level, according to plaintiff's theory, and, of course, if it had not been level she could not have performed at all, and right at the time she stepped on it, she would have noticed it. So it had to be level.

If you raise that two inches, that makes this right hand line 12 feet, and this 11 feet 10 inches, approximately. You have got to compensate for that; otherwise this bar would not be level down here. The testimony is positive on that subject. So you have to get the crane bar slightly on a level; but which side, gentlemen of the jury, has to come down in order to accomplish that adjustment? It can't be this side; it will have to be the other side, because you have to take up two extra inches on the right hand side. That [613] is the extra length. If you lower this corner you will only accentuate the difficulty, and make it worse. What she contends is—you remember her gesture on the witness stand, she says the clevis caught in some place here, indicated in general by the position of my left hand, the wrist straight, and when it fell the clevis clicked down in there.

Gentlemen of the jury, if that clevis had been in that position, it would only have made the situation worse, because it would have lowered the left side of the crane bar again, rather than the right side, so it would have had that much additional shortness in this side, in the left side. That could not have happened. They adjusted that, or attempted to adjust it, by claiming that that was compensated for by the guy lines; that the testimony of Mr. Miller is clear on the subject, that it could never have done so; in fact, he said if you pulled the guy lines, if the clevis had been fastened up, it would have pulled it back into place. It would have. She was mistaken, gentlemen of the jury; she was mistaken in the frenzy of a moment of desperation. She knew she was about to fall. That's what happened in regard to that.

Let me point out, in addition to that, to corroborate that fact, how could that trapeze bar have swung through two and one-half minutes of the act, in which she swung out to the right and left sideways, and swung backwards and forwards? She whirled the trapeze around until it wound up [614] behind her, and unwound. Certainly that motion would have unloosened any kind of a tangled up condition of the hooks. It just wouldn't have remained in that position. Even if it had been in that position, gentlemen, it would not have been gross negligence. It would have been negligence on the part of Mr. Pollinger, in leveling off the equipment. He would have seen the defect himself. He was the man who last inspected it.

We have testimony, and we have positive evidence on that subject, by six men, all unbiased witnesses. Gentlemen of the jury, not one of those men is presently employed by either of the defendants, and only one of them who has been employed, to-wit, Chandler Miller, within

the last seven years, because La Bay, Williamson, Matlock, Mentz and Thornton, those five individuals, at the time this accident occurred, were serving their last employment for either of the defendants in this case. Without exception these men said the trapeze was O.K.; was in its right condition, good condition, exactly as it always had been there. The testimony they have given lends credence to their story, because we know humans fail in small details; but the general picture is infallibly clear and uncontradicted in this case respecting that phase. And I notice counsel left it out in his opening argument. I must infer from that that either he considered it too weak for his argument to be sustained, or that he hoped to box my ears with it, shall we [615] say, when the closing argument is made, when I have no opportunity to reply to it and analyze that point.

Gentlemen of the jury, consider it in the light of the examination of the equipment, of the physical facts, of the impossibilities, of the total impossibilities, certainly improbabilities; then weigh it in the light of the gross negligence rule. You will find you have got nothing left, gentlemen of the jury, upon which to predicate liability against these defendants on that subject.

If there was something wrong with either the trapeze or the net, particularly the trapeze, in this connection, it would have been negligence on the part of Mr. Pollinger not to have seen it; then it would have contributed to the result obtained in this case, and would have prohibited plaintiff from recovery, because you must bear in mind, if there is any negligence, no matter how slight, on the part of plaintiff, that contributed in any way, as a proximate cause of the accident, plaintiff may not recover. Remember the rule, no matter how slight; if there is any.

There was, I think, a lot of contributory negligence in this case, because Pollinger, if there was anything wrong with the trapeze when it went up, and he examined it and failed to note it, he was certainly guilty of negligence. But he did not notice anything. The evidence is clear on that subject.

Pollinger was anxious to get to the side of his wife. I don't blame him for that; but I am afraid he misstated [616] himself slightly when he said that he could jump faster than he could run. If that is true, he is the only human being that has ever been able to do that, and the reason obviously is that you get more propulsion from your feet striking the ground, than anything suspended in air. Being a track man, I know that absolutely; if you keep your feet on the ground you can run faster than you can jump. That is a little inconsistent, and only shows the extent to which a witness, cornered with a difficult explanation, will go.

Regarding the operation of the net itself, gentlemen of the jury, in the first place, that net you will remember, was constructed in the manner, and operated in the manner, required by Miss Olvera herself. It was apparently satisfactory to her. In fact, she so testified; otherwise, over a period of six or seven months, when it was used, she would have protested regarding it. Likewise, it is apparent that it was operated on the day in question in the same manner that it had been therethrough. The only thing she said is true on that particular day is that these men did not move in unison and catch her when she fell. Let us consider the probability of a thing like that. Let us weigh it, first, in the light of ordinary negligence, gentlemen of the jury; then we will test it with the light of gross negligence.

It is an infallible rule of physics that a falling body goes 16 feet the first second, and accelerates to 32 feet the [617] second second. She fell 22 feet in this case; perhaps a foot or two more, and the total time elapsing, gentlemen of the jury, from the time she commenced her fall—and the rule involved is one which involves the object starting from a stationary start, which she was, that is to say, she started falling, and of course, the first few feet she did not fall as fast as she did the next eight or ten of the first 16; mind you, it would take one and one-quarter seconds, approximately, for Miss Olvera to fall from the front of that trapeze bar, and she was standing up, and it could only have been a foot or two higher than 22 feet at most, because she said she was standing up. You can figure that out yourselves; one and one-quarter seconds, gentlemen of the jury, for that body to fall clear to the ground.

Gentlemen of the jury, do you believe that eight or ten—call it eight men, holding a net, suddenly confronted without warning of a situation, such as these men were, could humanly possibly have reacted in unison, and have moved that net over a distance of from one to two feet, sufficient to catch that woman, and obtain that result in a second and a quarter? You couldn't get eight men to move in unison that fast. It is not possible. You could not get all eight of them to realize what was happening in that length of time; not one of them could have moved. They could have caught her, maybe, if Miss Olvera in falling had caught on the ropes or the rigging on her first second or second second, and then [618] fell to the ground; perhaps they then would have had enough time—three or four seconds—in which to react, but not, gentlemen of the jury, not in a second and a quarter. or-roborative of that contention is the fact that one man was

struck, according to Mr. Marcus' argument, while he was apparently attempting to get out of the way. Even then that man would not have stood there, and have been struck, who was attempting to get out of the way, if he had time to get out of the way. That point, if there were any doubt in your minds on the subject, would certainly be obviated by multiplying that by eight. Try to get eight ordinary responsible prudent men, which is testing it under the rule of ordinary negligence—ordinarily prudent, to move the net in such a short space of time. Bear in mind, some of these men are on the end of the net; not all sideways; they are there around the whole thing. It is not physically possible, gentlemen of the jury, as a pure matter of ordinary care; but when you test that situation in relation to gross negligence, and state that these men or their employers are guilty of gross negligence in failing to move that net that distance, under those circumstances, in that short space of time, it just isn't possible. It isn't humanly possible to do that; and it isn't true that they were guilty of any gross negligence.

I have pointed out that they acted as ordinarily prudent men would have acted. I will point to another circumstance [619] that would indicate that fact. This woman fell so close, not to exceed a foot, perhaps a little less, an ordinarily reasonably prudent man would have thought, especially if she were in a ball, turning over, that she would fall into the net. An ordinarily prudent man might have thought it was not necessary to move, under those circumstances, if they could move; and to charge that same ordinarily prudent man, not only with negligence, under those circumstances and conditions, but with gross negligence, so bad as to have constituted a willful disregard for the rights of another, I am sure you

are not going to do, gentlemen of the jury. It is not right.

I think what happened in this case is actually related by Mr. Williamson. I am only picking out his statement, because it is before me:

"She was getting ready for her act and talking to me. She said that she was going to do a good act because some of the officials of Ringling Bros. was there sitting in the seats in front of her rigging. She asked me to point out Pat Valdo and show her where he was sitting. Pat Valdo is one of the big men from the Ringling show, and he has charge of hiring all the artists. She looked very nervous to me.

"Q—What occurred?

"A—She got up there and done her full act until nearly to the finish, and she fell from the last trick that she done. * * * She fell from the bar of the trapeze while she was [620] making a bow to the audience with her right hand extended to the audience. All of a sudden she lost her balance and fell to the ground. * * * At the time she fell, she was swinging more farther than usual, and when she fell she fell beyond the net."

Gentlemen, that's what happened to Miss Olvera. She was there, anxious to get back to the Ringling show, which was the big show. Pat Valdo came over that day. They were 40 miles away, in Texas, or Kansas, or a place adjoining them, so she knew that, and put a little extra vim into her act to impress Pat Valdo, and, as Miller said, she fell, in her style. Style means that little gesture or motion she was giving to the audience. That is not an act for which these defendants should have a record made of the excoriating criticism of gross negligence. The fact of the matter is it was Miss Olvera's own unfortunate

act, or her own carelessness that caused the misfortune; it was not the defendants'; and money should not be taken away from these defendants, and given to this plaintiff, just because she suffered an accident. That is not right; it is not the law; it is not justice, because the defendants are here entitled to the protection of the law and the court, just as the plaintiff is.

To summarize briefly, gentlemen of the jury, and then I am through—and let me suggest to you that in order to hold the defendants you would have to find against us on all five of these points; not one, but all five, because, as the [621] radio game goes, not one, not two, not three, not four, but all five. She was performing under this particular contract, and I have called the terms to your attention. I sincerely hope you will study it in the jury room. Its terms are clear and unambiguous. It is an independent contractor's case, and the relationship of master and servant does not exist. And an independent contractor is not entitled to the same degree of care as an invitee or guest, or a number of other relationships, including that of master and servant. The responsibility owed to an independent contractor is only to protect the independent contractor from conditions of which the contractee has knowledge, and the independent contractor has neither actual nor constructive knowledge. None of these factors exist in this case; so that it not being an independent contractor's case, the plaintiff is not entitled to recover.

The Court: Pardon the interruption. Will you read the last part of Mr. Combs' statement?

(Record read by the reporter.)

The Court: You are stating what you believe the court will instruct the jury?

Mr. Combs: That's right, your Honor, I believe the court will so instruct the jury.

Second: Her contract, and the accepted procedure in the show business, provided that she controlled the inspection and supervision of the apparatus. And, further than that, [622] gentlemen of the jury, she actually did so on this particular occasion, because Pollinger leveled it off; and if he didn't level it off, he should have; and to have failed to do so would have made him a principal, and his own wife in this case responsible for his contributory negligence in that regard.

Third: She accepted all of the risks incident to this class or type of business. She knew them all; had vast experience. In fact, as I recall, she said she started when she was two years old, and her father held her on his hand, like this, she said. That was one of the reasons why she had her husband examine and look at this apparatus from time to time. He was the first to inspect it, because she had confidence in his inspection, and knew it would be done well. On account of that fact, in this case, because she knew the risks of the business, to have been neglectful in that regard would have been contributory negligence on the part of the plaintiff; and if you find there was any such negligence, no matter how slight, I believe the court will instruct you if it contributed proximately to the result in the case, you must find for the defendants in this case.

Fourth: The release of liability clause in the contract itself, which as I have outlined to you, requires a test more severe than ordinary negligence, and I believe the court will instruct you in that regard, in substance as follows: Gross negligence is different and far greater than ordinary [623] negligence. Gross negligence has

been defined as a want of slight dilligence. A want of even slight diligence; an entire failure to exercise care.

Already haven't we gotten a verdict for the defendants on these first two tests? The third one is the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of a conscious indifference to consequences.

Is there a single bit of evidence in this entire case, gentlemen of the jury, where any such condition of fact existed? Do you believe that these net holders were consciously indifferent to consequences? Do you believe they exhibited an entire failure to exercise any care? I don't think you do. They didn't. There is no question about that. The rule even goes further. We believe that the court will instruct you that it has to amount to a willful disregard of the rights of another, or what amounts to that. There was not any of that in this case, gentlemen of the jury. On either of those phases there was no gross negligence.

Point five: If they go beyond that, gentlemen of the jury, it would be an unavoidable accident. That is all. If it is an unavoidable accident, I believe the court will instruct you that no one can recover in the case, because, of course, no one is negligent.

Well, I appreciate I have spent my hour, your Honor.
[624]

The Court: No, you have not. Besides, the court took out some of your time.

Mr. Combs: How much time have I consumed?

The Court: You have about 14 minutes.

Mr. Combs: Now, gentlemen of the jury, I have about 14 minutes more to argue. I am not going to take all of

that time. I am going to say, in closing, I want to reiterate the five points I have just indicated:

1. This woman was performing under her contract as an independent contractor, and not as a servant, and the duty owed her was entirely different than that owed to the ordinary servant or any invitee;

2. Her equipment was required, under her contract, to be inspected, supervised and controlled by herself, and that was done, gentlemen of the jury, in this case, and the evidence shows it.

3. She accepted all of the risks and hazards of her business.

4. The plaintiff could not possibly recover in this case, because she has not shown gross negligence, or wanton disregard for the welfare or safety of others, on the part of the defendants; and,

5. The most that can be said of the plaintiff's claim, is that she suffered an unavoidable accident, if it was not the result of her own contributory negligence.

I want to thank you gentlemen of the jury for listening [625] patiently to me, in what was a technical and somewhat difficult argument. I think you have listened to this case attentively and thoughtfully all the way through. We have no hesitancy or doubt or concern in submitting this matter. When I say we, I mean I, as representing these two corporations, because we know that you are in that frame of mind, in deciding this matter, that you would be in, if your own personal matters were involved; and we rest solidly and confidently on the factual basis, not on emotional and sentimental appeal. And that is right, and that is as it should be.

(The court after admonishing the jury took a short recess.)

(Stipulated that the jurors were all present and in their seats.) [626]

CLOSING ARGUMENT BY MR. MARCUS.

Mr. Marcus: If this argument had come from any other source than able counsel for the defendants in this case, I would rather be amused, but when he asks you people, you men of the jury, to believe men like Chandler Miller, as being honorable, fine, upright witnesses, something is radically wrong in the administration of justice, when by ingenious device, by argument that is hardly deserving of one who occupies the position as counsel does, to say, what else could these men holding the rigging have done? Didn't they act as prudent men should have done? Under the circumstances, standing there like pieces of wood, and not to have moved one inch, but standing there, and failing to move—was that the right thing for them to have done, to have stood there and not to have moved?

What was the purpose of having men standing there and holding the net? You may have seen in motion pictures firemen holding a net, watching people, waiting for them to be caught in the net. That is the purpose of a movable net. That is the reason they had that kind of net there, holding it; men of experience—at least they should have been experienced—holding it for that purpose, if someone should fall, to catch them in the net.

They should at least move; should at least make an effort. Was that done? No. That fellow standing there—I have got [627] another name for him—probably pulled his head aside and got caught on the shoulder. The rest did not matter. That is the testimony of Chandler Miller. Is that what you call the exercise of due care and caution?

Is that what you claim this plaintiff assumed? Is that what she did, when she assumed the risks of her employment? Does that mean that she assumed the risk of somebody else's gross negligence, of the employees of the circus? Those are the insinuations, innuendoes, the intimations, because she gave them a tip once in a while, because she told them their work was nice and good, on occasions, that they were her employees, working for her. Why was that insinuation made? Because we don't want the onus; we don't want the responsibility; we don't want the negligence, if any, attached to us as a corporation. What was the word that was used? Don't shame us by insinuating by your verdict that we are guilty of gross negligence. No, don't shame them.

He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone, without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it. And counsel very dramatically says: Take it [628] or leave it, because if you don't, and the contract is in some other form, whereby we assume some of your responsibility, some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words.

Do you know why they put "independent contractor" in that agreement, that printed contract? Counsel knows, and I know. He says there is no relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there wouldn't be any law-

suit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would have been paid. This vicious contract, that was printed and delivered to her, it says "Independent Contractor Agreement." Independent for Ringling Bros. Circus. And that's the reason why they put that on there.

Counsel again says: Maybe Mr. Marcus didn't comment upon the hooks, and maybe he didn't comment upon the bar or the variation of one end of the lines, or the clevis, or the 8-hook, because he wanted me to do it, and then get me boxed up. Counsel, it isn't for me to box you up. You have boxed yourself up. That's just what you did. Let us start from the testimony alone. I didn't comment upon that, but I [629] will now, and if it boxes you up, it's just too bad.

There were five witnesses in this case. Jack Lysaught was one; Miguel Aristo was another; employees of this circus.

Mr. Combs: Excuse me, but Jack Lysaught's testimony wasn't read.

Mr. Marcus: I beg your pardon. I read Jack Lysaught's testimony.

The Court: We will have to refer to the record.

Mr. Combs: If you did, I will withdraw my comment to your credit. Was the testimony read?

Mr. Marcus: It was.

Mr. Combs: All right. We will withdraw the objection.

Mr. Marcus: Charles Johnson, Mr. Yacopi, who has been sitting back there, and all of those were employees of

Ringling Bros. and Barnum & Bailey's Shows, or Barnes. They were employees of theirs at that time, and some of them after that date. What did they testify to? At least we have got the testimony from the mouths of the witnesses themselves, who were working for the circus at the time. They said there was no music going on; at least some of them said that. I am not going to point out which witness said what, but this was the gist of all that testified: When she came to the final portion of her act, which was a feature performance, the music stopped. She was performing on that bar up there, and she was swinging out. All of a sudden they heard a noise of the trapeze, the noise that the trapeze [630] made when it came down, and they looked up. Aristo said, Yacopi said, Johnson said, and I believe another witness said, at least Miss Olvera said so, and her statement stands in the record; not her own statement, as counsel would have you believe, of the conditions there, but the statement of the employees of the circus themselves, that one end of that line was lower than the other end, of this trapeze bar.

Then by some ingenious argument that he wants to indulge in, so far as the law of physics is concerned, he says: Gentlemen, a body, starting to fall from a fixed point, dropping straight down, falls 16 feet per second. You gentlemen know, and I know, that a body starting at one point, falling straight down, falls 16 feet per second; but how does that apply to a woman who is swinging on a trapeze back and forth, and she swings out on the bar, and she starts to fall; she grabs her knees; she turns a somersault in the air, and to all of that he wants to apply the law of physics.

We are not dealing with a dead body, because she is not dead yet, and she was not falling straight down. That is why that argument is not plausible or reasonable. Gentle-

men, when you get into a jury room, figure all of these facts. Take out your watches when you get there. She had a fall of about 22 feet, and see what a second is. How long does it take to move that net one foot? That is all that is involved in this case. That is all we are concerned with. [631]

Counsel says—what was the other assumption of risk? I say to you that certainly she did not assume the negligence, and the court will instruct you to that effect, because if she assumed negligence, and assumed gross negligence of the employees of the circus themselves, we would have no business in this court, and would have no lawsuit. But that is not the law. That is not the instruction the court will give you, because she does not assume somebody else's negligence.

She assumes the risks of her employment. That might be an unavoidable accident. She might have slipped, on a trapeze, and have fallen down. She was not under that contract, because being an independent contractor, that's a risk of her employment. But don't consider any shame to this corporation, this company, because of their being grossly negligent, because that would not be proper. The men holding the net there, the employees of the circus, are bound to use some degree of care. Would you say it was using a slight degree of care—and I am using his own words—would you say it was using a slight degree of care to have stood there and not to have moved that net at all? To have looked and to have failed to see is just as bad as not to have seen at all. To do something required to be done under the circumstances is just as bad as not doing anything at all, which they didn't do. There wasn't any degree of care exercised at all. There wasn't any care [632] exercised. The only thing they had to do was to

push that net over. And the argument that counsel has advanced, and wants you gentlemen to believe, is that they acted as prudent men in failing to do anything, because Miss Olvera at least in falling could have guided herself to have fallen in the net. Did you hear that argument? They assumed she would fall into the net. Maybe she should have sent a message beforehand that she was going to fall, and to please move the net. That would have been just as plausible. It is just as ridiculous.

They were put there for that purpose. They didn't need eight men holding the net, to stand there, if it was a movable net, to have caught her, because that was the purpose for which they were placed there; that was the sole thing they had to do; they had nothing else to do but to watch her net; and when there was some untoward accident in this case through the faulty erection of that trapeze, because she went through her act already, at least to the point where she stood up, she fell, it was their business, their duty, their obligation, because they were employees of that circus, under that contract with Ringling Bros., to have moved in a slight degree, and to have caught her, and to have avoided this accident. That was all that was required of them to be done.

What else have they attempted to show here? They claim that Mr. Pollinger himself, because he stood there and [633] watched them lowering the bar, assuming that to be true, agreeing with them for the purpose of this argument, that he looked at the bar, and did with his hands like that, that he was responsible for the failure of that apparatus, not because it was level, because everyone agrees it was level, and maybe it was level, but because the top bar was not level. Possibly counsel has had more experience in physics, chemistry and mathematics than I

have had, but wasn't that a spontaneous, honest opinion of Miss Olvera when she took down that little pocket book—Miss Olvera, if one line is shorter than the other, then one side will swing further than the other?—I don't think so; it didn't happen in my case, because the lower bar was level. And she took out her pocket book spontaneously and demonstrated to you gentlemen just how it happened.

Miss Olvera has been accused of being a great dramatic artist. We haven't taken that honor yet. We have only proposed for her that she was a great trapeze performer, which has nothing to do with being a dramatic artist yet. Maybe this feeling of hers that you see has come from the bottom of a tortured heart, a tortured body, and if that is sentiment, let it fall where it may, because that is just what her condition is today. If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed [634] a wee bit dramatic because of it, it has come from the sincerity of her soul; not as counsel would have you believe, that it is a dramatic gesture to ingratiate herself in your hearts. Shame for suggesting that, counsel, because you, as well as I, know the sincerity of her feelings, and of her true and honest condition.

Gentlemen, I am going to leave the case with you, with a sincere and abiding conviction that you are going to do justice. If you have to shame this corporation, because of gross negligence—and counsel has attached a great deal of significance to the fact that it is gross negligence, which means more negligence than ordinary negligence, then do it; for goodness sake do it. It has to be done. It means a lot. This is her last opportunity. It has taken a long time, months and years, to get so far, and I rest

this case with you gentlemen, knowing that you will do justice. Thank you.

(The court after admonishing the jury here took an adjournment until 10:00 o'clock a. m. the following day, Wednesday, January 12, 1944.) [635]

Los Angeles, California, Wednesday, January 12, 1944;
10 a. m.

The Court: The members of the jury are all present. Is it so stipulated?

Mr. Combs: So stipulated.

Mr. Marcus: So stipulated.

(Court's Instruction A):

The Court: It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as the court gives it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

(Plaintiff's Instruction No. 4):

Any evidence that has been received of an act or omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of oral admissions of a party other than his own testimony in the trial, ought to be viewed by you with caution.

(Plaintiff's Instruction No. 5):

A witness false in one part of his testimony is to be distrusted in others, that is to say you may reject the whole testimony of a witness who wilfully has testified

falsely as to a material point, unless from all the evidence you believe that the probability of truth favors his [636] testimony in other particulars.

(Plaintiff's Instruction No. 6):

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witness and after weighing the various factors of the evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

(Plaintiff's Instruction No. 7):

Your verdict must be based solely on the evidence received and the law as given you in these instructions, and not upon anything you may have otherwise heard or read. The instructions are to be considered as a whole.

(Court's Instruction B):

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation concerning the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it.

(Plaintiff's Instruction No. 8):

You are the sole and exclusive judges of the facts in [637] this case and of the credibility of the witnesses. Your power of judging, however, is not arbitrary, but must be exercised with legal discretion and in subordina-

tion to the rules of legal evidence. You are not bound to believe the testimony of any witness unless such testimony imports verity and establishes conviction in your minds. Nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or against other evidence satisfying your minds. Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case, if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness, or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth.

(Plaintiff's Instruction No. 9):

The term "preponderance of the evidence" means that the evidence on one side is of greater weight than the evidence produced on the opposite side; it does not mean necessarily that a preponderance is produced by a greater number of witnesses—it is the greater weight of the credible evidence as it may appear to the minds of the jury. [638]

(Court's Instruction C):

The burden is upon a plaintiff alleging gross negligence to prove such negligence by a preponderance of the evidence, and that such gross negligence was the proximate cause of injury to the plaintiff. To establish the defense of contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the plaintiff was negligent and that such negligence con-

tributed in some degree as a proximate cause of the injury. Contributory negligence may be inferred from the whole evidence, or a part thereof, without regard to which party or parties introduced such evidence.

(Plaintiff's Instruction No. 14-A):

If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, [639] Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if

any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows. [640]

(Plaintiff's Instruction No. 16):

If after considering the evidence you find the plaintiff is entitled to recover, you will consider in fixing the amount of the award the elements of damage that I now am about to mention; the reasonable value of plaintiff's time lost, if any, since her injury wherein she has been unable to pursue her occupation. In determining this amount you should consider evidence of Plaintiff's earnings and the manner in which she ordinarily occupied her time before the injury, find what she was reasonably certain to have earned in the time lost had she not been disabled; you will also consider not only the element of damage heretofore mentioned but also such sum as will reasonably compensate plaintiff for the pain, discomfort and anxiety, if any, she has suffered by her and proximately resulting from the injury in question; and for such pain, discomfort and anxiety, if any, as she is certain to suffer in the future from the same cause. Also the sum as will reasonably compensate plaintiff from any loss of earning power occasioned her by the injury in question

and from which she is certain to suffer in the future. In fixing this amount you will consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of her injuries, whether or not they are reasonably certain to be permanent or if not permanent, the extent of their duration all to the end of determining the effect of her injuries upon her by the earning capacity and the present [641] value of the loss so suffered. Damages, if given, must be reasonable and your award, if any, must be based on a preponderance of the evidence. Such damages, if any, may not exceed the sum prayed for in the amended complaint.

(Defendants' Instruction No. 2):

If the jury find from the evidence that the plaintiff herself was careless or negligent at the time and place of the accident, and that such negligence proximately contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

(Defendant's Instruction No. 4):

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and that there was a defect in said apparatus which was the proximate cause of her injury, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants.

(Defendant's Instruction No. 5):

I further instruct you a contractee owes no duty to an independent contractor, other than to protect the independent contractor from conditions of which the contractee has [642] knowledge and the independent contractor has neither actual nor constructive knowledge.

The Court: Mr. Combs, do you have a copy of the instructions?

Mr. Combs: Yes, I do.

The Court: No. 4. May I have it? I want you to read that, please.

The court instructs the jury to disregard the instruction before the last entirely, and in lieu thereof I shall read this one.

I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and that there was a defect in said apparatus which was the proximate cause of her fall, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

The Court: The next one, will you read that, please?

(Defendant's Instruction No. 7):

You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, [643] America Olvera, was performing duties as-

sumed by her under her written contract with the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., and no other; that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of "independent contractor" on the part of plaintiff, and "contractee" on the part of the defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

(Defendants' Instruction No. 9):

You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so light a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences. [644]

(Defendants' Instruction No. 11):

You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence toward her, you must find for the defendants in this action.

(Defendants' Instruction No. 17):

In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover if her injuries were caused by such danger and peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.

(Defendants' Instruction No. 19):

In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be [645] based upon sympathy for or prejudice against any party.

(Defendants' Instruction No. 22):

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor,

one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

(Defendants' Instruction No. 23):

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or [646] caution, still, no one may be held liable for injuries resulting from it. Both gross negligence and proximate cause, as defined in these instructions, are requisites for founding liability.

(Defendants' Instruction No. 24):

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of gross negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that the cause of the accident was one not involving gross negligence on defendants' part as it is that gross negligence on their part was a proximate cause, then, because the conflicting probabilities are equal, a case against the defendants has not been established.

(Defendants' Instruction No. 25):

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. Inasmuch as the amount of caution used by the ordinarily prudent persons varies in direct proportion to the danger known to be involved in his undertaking it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, [647] the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

(Defendants' Instruction No. 26):

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such gross negligence was a proximate cause of injury to the plaintiff.

(Defendants' Instruction No. 27):

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

(Defendants' Instruction No. 28):

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment

on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

(Defendants' Instruction No. 30):

You are instructed that an unavoidable accident is one that occurs while all parties are exercising ordinary care, [648] and if you shall find from the evidence that both plaintiff and defendants were exercising ordinary care at the time of the accident, you shall find that the accident was unavoidable and you shall render your verdict in favor of the defendants.

(Defendants' Instruction No. 31):

You are instructed that the plaintiff was working for defendants under and by virtue of the terms and conditions of the contract between the parties hereto executed on September 24, 1936; that the same is a valid, binding and enforceable contract, and you are further instructed that under the terms and conditions thereof the defendants are released from any acts of ordinary negligence of their part in connection with the operation and management of the equipment involved in this accident. If you find that the defendants were not guilty of gross negligence in the maintenance and operation of the equipment involved in America Olvera's act, you are directed to bring in your verdict for the defendants.

Whatever your verdict is, it requires the unanimous agreement of the members of the jury, and it must be signed by your foreman. For your convenience the court has had prepared some forms of verdict, which you may take with you when you retire to deliberate.

Will you swear the officer?

The court now stands recessed.

(Recess.) [649]

Mr. Marcus: If the jury should come in in my absence, may it be stipulated that the verdict may be returned in my absence?

The Court: It has been agreed that the exhibits, with the exception of the trapeze and blackboard, may be sent up to the jury.

Mr. Marcus: It is so stipulated.

Mr. Combs: So stipulated.

Come now the defendants in the above-entitled action, and pursuant to stipulation and order of court herein, hereby make, present and file their objections to instructions given at the request of plaintiff in the above-entitled matter, and further except to the giving of said instructions on the following grounds, for the following reasons:

Object to the giving of plaintiff's instruction No. 14 on the subject of the measure of damages, for the reason that the same does not truly and correctly express and relate and state the law of Kansas, or the law of California, regulative of damages, in that it includes elements not proximately attributable to an injury, and that the same violates the law of any jurisdiction, for the foregoing reasons.

Come now the defendants, and each of them, and object to the failure of the court, and refusal to give instructions submitted by the defendants, and excepts to the ruling of the court in connection therewith, by virtue of and on account [650] of and for the following reasons:

Object to the court's modification and rewriting of plaintiff's proposed instruction No. 4, for the reason that it includes and adds elements other than those properly the subject matter of this case. We will return to a further objection concerning this instruction later, the court at present having the defendants' copy.

Object to the failure of the court to give the entire defendants' proposed instruction No. 5, and to the failure of the court to give any instruction beyond the word "knowledge," as submitted, for the reason that the defendants were entitled to an expression and a declaration that they were entitled to a verdict in the event the facts and circumstances related in the remaining portion of said instruction, not given by the court, were found by the jury to exist.

Object to the modification of the court of defendants' proposed instruction No. 31, in using the word "maintenance" in lieu of "management," being the 22nd word from the end of said instruction, on the ground that "maintenance" has a different meaning than "management," and that the same confused the jury, and the defendants were entitled to the use of the word "management."

Come now the defendants, and object to the failure of the court to give, and to the court's refusal to give, and except to his ruling in that connection, the following [651] instruction:

Defendants' Proposed Instruction No. 1. In this case defendants were entitled to a directed verdict for the reason that there has been no evidence produced during the trial of this case of either gross negligence or willful misconduct, and that the evidence does not establish even ordinary negligence in this case; and upon all the grounds of the motion for a directed verdict heretofore made.

Object to the failure and refusal of the court to give defendants' proposed instruction No. 3, on the grounds that said instruction should properly have been given, as it defines and informs the jury as to the rights and remedies available to an independent contractor, and it tests and

establishes the degree of responsibility of defendants in contractual relationship in this case, and likewise deals with the defense of assumption of risks.

Come now defendants, and object to the failure and refusal of the court to give defendants' instruction No. 6, for the same reasons and upon the same grounds as those contained in the objections to the failure and refusal respecting instruction No. 3; on the grounds that it is an instruction of the law regulative of the contract of the parties hereto, and as such, one which the defendants were entitled to have.

Come now defendants, and object to the failure and refusal of the court to give instruction No. 8, as submitted [652] by defendants, on the grounds that the same omits and leaves out the right of defendants to the defense of assumption of risk, and impairs the obligation of the contract of the parties hereto.

Come now the defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 9-A, on the grounds, in doing so the court deprived the jury of the definition and the law of gross negligence, and failed to include in the instructions given by the court on the subject the element of willfulness, particularly inasmuch as the statute of the State of California refers to willful misconduct, or wilful injury, only, and that was likewise a part of the federal law in connection with the consideration of this case.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 10, on the grounds that failure to give the same leaves the jury uninformed on the law of this case relating to gross negligence, and the right of the plaintiff to recover.

Come now defendants and object to the failure and refusal of the court to give defendants' instruction No. 19, and to the court substituting one of his own instructions on that subject, on the grounds and for the reason that the instruction substituted by the court does not fully and completely state the law regulative of the fair consideration to be given to the corporate defendants, and that defendants' [653] proposed instruction 19 does. That to deprive defendants of their instruction on that subject deprives them of the complete consideration and instruction of the jury thereon.

Come now defendants and object to the failure and refusal of the court to give defendants' instruction No. 20, on the grounds that the same eliminates from the consideration of the jury the doctrine of assumption of risks, to which, under the law, and under the contract, defendants were entitled to have considered by the jury.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 21, on the grounds, and for the reason, that it deprives the jury of a consideration of the law of fellow servant, and the law instructive of the conduct of fellow servants. In this case the court allowed evidence to go in, over the objection of defendants, to the effect that any new relationship, other than that of the contract, was created by operation of law, and the conduct of the parties, in relation to the management and maintenance of the apparatus, and in particular of the net. This brought into focus the master and servant rule, and the instruction, therefore, should have been given.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 29, for the reasons, and on the grounds hereto-

fore stated in connection with instruction No. 21; that the court allowed [654] evidence to go in on the subject of fellow servant, and the jury should have been instructed on the law regulative thereof.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 32, on the grounds and for the reasons that in refusing to do so the court deprived the jury of an adequate consideration of the subject of gross negligence, and of the element of wanton, reckless, and willful misconduct, as defined by the statute of the State of California, and in conformity with the federal court rule; and that the jury, not having been instructed at any time concerning the element of willful misconduct, or actions on the part of defendants or their servants, the court should have instructed a verdict for the defendants on the grounds that the release involved in the contract was binding.

Come now defendants and object to the failure and refusal of the court to give defendants' proposed instruction No. 33, on the grounds and for the reasons stated in the objection to instruction No. 32, and for the further reason that the jury was thus deprived of a contrast or distinction between gross and ordinary negligence, and a definition of willful and wanton misconduct, and a distinction between willful and wanton misconduct and ordinary negligence.

Come now defendants and object to the court's own instruction given on the subject of contributory negligence, [655] on the grounds and for the reason that the same assumes facts and conditions not within the evidence in this case, and does not correctly and truly state the law of contributory negligence.

Come now defendants and object to the court's modification of defendants' proposed instruction No. 4.

At this point the defendants desire to object to all of the instructions given by the court on his own motion, including that given immediately following defendants' proposed instruction No. 4, and those two given immediately following plaintiff's instruction No. 9. These instructions have never been presented to, or in the possession of, nor read by these objecting defendants or their counsel prior to having been read by the court to the jury, and are not at this time available to counsel for the purpose of stating the grounds of objection thereto, but as soon as they are made available counsel will state in the record the grounds of objection, or file their objections in writing at a later time.

Come now defendants and object to the court's instruction, being a formula instruction, directing a verdict for the plaintiff in the event of certain circumstances and facts being found by them, said formula instruction not being at the present time before counsel, and this objection being made from memory only, counsel never having seen said instruction, it having been prepared and given by the court [656] of its own motion, and this objecting counsel never having seen the same, and the same not having been given a number, on the grounds and for the reason that said instruction does not include all the elements of defense raised by defendants in their answer, and in this case it purports to direct a verdict in the event of a finding on an indefinite number of facts, matters and things concerning the case, leaving out other defenses, and leaving out matters contained in the defenses pleaded by defendants. That said instruction does not correctly state the law, is confusing, and in conflict with other in-

structions given in this case, and contrary to law as given in this case.

The court now having presented the instructions referred to above to counsel, the following additional objections are made, and exceptions taken, in addition to those heretofore made:

The defendants object to the rewriting and changing by the court of defendants' instruction No. 4, for the reason and upon the ground that the same omits a consideration of the element of the net, as rewritten, which theretofore was included.

Come now defendants and object to plaintiff's instruction No. 14-A, and except thereto, on the following grounds and for the following reasons: That the same does not include or contain a complete statement of all the defenses raised by the defendants, and being a formula [657] instruction, and omitting several of said defenses, as stated in said answers, is improper and prejudicial, and should not have been given. Said instruction omits the defense of independent contractor, assumption of risk, fellow servant rule, element of willful injury, and the same fails to include the element of release of damages, both in relation to gross negligence and willful misconduct. That said instruction 14-A is objectionable, and defendants hereby object and except to the same, for the further reason that it is confusing, incorrectly states the law, is contradictory to the law as stated in other instructions, as the same exists in this jurisdiction, and regulative of this matter. That the same combines and confuses ordinary and gross negligence, so that the jury was thus mislead as to whether they could return a verdict based solely on gross negligence or ordinary negligence.

The Court: In giving instruction No. 31 the court did not intend to substitute the word "maintenance" for "management"; as used in said instruction, and in order to correct the same will call the jury down and re-read the instruction as the court intended to give it.

Mr. Combs: I think, your Honor, I am rather inclined to be of the impression that the matter is rather immaterial. In making this statement, however, I would not want to have the jury called in for the reading of other instructions. I want it understood this is the only one to which I waive my [658] objections. In other words, if the jury is to be called down for the reading of anything else—

The Court: I don't intend to. I don't see any purpose in calling them down for reading anything else. I **am** willing it should be corrected, unless you are willing to withdraw your objection.

Mr. Combs: I think we will withdraw our objection, your Honor.

The Court: Mr. Dewing, will you read some of the preliminary matters?

(Record read by the reporter.)

The Court: Mr. Combs, I went off the bench immediately to make a change in the copy of the instructions which I had changed myself, and I did not have time to complete the change for your copy before you began to give your objections, so I notice there is some statement you had made of the fact that the court had your copy. I asked you to let me have your copy so I could make the change in them.

Mr. Combs: That may have been one of these.

The Court: One of those was defendants' No. 4.

Mr. Combs: My reason for making that statement in the language that followed, was that should it occur that the jury came in in an extraordinarily short time, which was a conceivable situation, before I had the opportunity of looking at them, I wanted the record to appear that I had not.

The Court: It would not have made any difference. The [659] court would have permitted you to make your objections.

Mr. Combs: So far as that is concerned, I later made the statement in the record that I now had an opportunity to see these instructions, and I was then making my objections to them.

The Court: And you made all the objections and exceptions that you desired to make, after you were given copies?

Mr. Combs: That's right, your Honor.

The Court: I think, for the purpose of the record, any objection that you have made to 16—will you turn to 16, please?—that it should be 16, on the measure of damages. The one you have referred to as the formula instruction is plaintiff's instruction 14-A. Mr. Marcus, if you will approach the bench I will show you the one marked defendants' instruction. I will mark this 14-A.

Mr. Marcus: That is satisfactory.

The Court: Is that satisfactory to you, Mr. Combs?

Mr. Combs: Yes.

The Court: The number of the instruction to which the exception was waived—exception and objection—was numbered defendants' 31.

Mr. Marcus, if you have any objections to the giving or failure to give any of the instructions you offered, you may make them now.

Mr. Marcus: May we, your Honor, make the same after the jury comes in? Would you have any objection to that, counsel? [660]

The Court: I think you may just as well do it now, while we are waiting for the jury.

Mr. Marcus: Your Honor, I will sit here with the reporter, and dictate the same to him.

Plaintiff objects to the court's refusal to grant instruction No. 3, defining negligence, upon the grounds and for the reasons that the jury were entitled to be instructed upon the definition of negligence, upon which the charge of gross negligence was predicated.

Plaintiff objects to the court's refusal to give instruction No. 10, defining preponderance of evidence, and contributory negligence, and by what degree of proof each must be established, for the reason and upon the grounds that the jury were entitled to be instructed upon the theory that if such contributory negligence was established, that such contributory negligence must be so established by a preponderance of such evidence.

Plaintiff objects to the court's refusal to grant instruction No. 11, upon the grounds and for the reasons that such instruction defines the acts of the agent as being binding upon the principal, if done and performed within the scope of their authority, and further, that the contract provided and permitted such defendant, Ringling

Bros., to place the plaintiff with any other of its shows or circuses under its ownership or management, and provided that all terms and conditions of the contract continued, [661] prevailed and obtained, and that the jury, therefore, was required to be instructed that such judgment, if any, against Barnes be given against Ringling Bros. as the original party to said contract.

Plaintiff objects to the court's refusal to give instruction No. 12, on the ground that said instruction contains plaintiff's theory of the case without any defenses thereto interposed, which were elsewhere given in the instructions.

Plaintiff objects to the giving of defendants' instruction No. 5 on the grounds and for the reasons that the law is not that an independent contractee owes no duty to the independent contractor.

(The jury returned into court at 3:17 p.m.)

The Court: The members of the jury are all present. Do you so stipulate?

Mr. Marcus: So stipulated.

Mr. Combs: So stipulated.

The Court: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Court: Mr. Colburn, you are foreman?

Mr. Colburn: Yes, sir.

The Court: Will you stand and read the verdict, please?

(The foreman of the jury reads the verdict in words and figures as follows): [662]

In the District Court of the United States,
Southern District of California
Central Division

No. 8367-B Civil

America Olvera, also known as
America Olvera Pollinger,

Plaintiff,

vs.

Al G. Barnes Amusement Company,
a corporation, and Ringling Bros.-
Barnum & Bailey Combined Shows,
Inc., a corporation,

Defendants.

VERDICT.

We, the Jury in the above-entitled case, find in favor of the plaintiff, America Olvera Pollinger, and against the defendants, Al G. Barnes Amusement Company, a corporation, and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a corporation, and assess plaintiff's damages in the sum of Fifty thousand dollars (\$50,000.00).

Dated: Los Angeles, California, January 12, 1944.

WILLIAM E. COLBURN,

Foreman of the Jury. [663]

(The clerk here re-reads the verdict as above set forth.)

The clerk: Is that your verdict, each and all of the jurors?

(The jurors thereupon answered in the affirmative.)

The Court: Do you desire to have the jury polled?

Mr. Combs: Yes, your Honor.

The Clerk: As I call your names, gentlemen, will you state whether or not the verdict as read is your verdict.

(The jurors were thereupon polled, and each and every juror answered in the affirmative.)

Mr. Combs: If the court please, at this time defendants would like to make a motion for a stay of execution, to a period of 20 days beyond the date of a ruling on a motion for a new trial in this matter, if we may have such stay of execution.

The Court: Have you any objection, Mr. Marcus?

Mr. Marcus: Would it have to be that long, counsel? I don't think the customary period of a stay is that long.

Mr. Combs: Only this, your Honor: We are going to make a motion for a new trial. The last time we asked for 20 days and we got it. I don't believe the motion for a new trial will be passed upon in that period of time.

The Court: Could it not be granted until the motion is made, and then you may request additional time?

Mr. Combs: I am asking for it in this manner, because the last time we had to come in and get an order extending [664] the time, after the 20 days had expired. I think we are just saving ourselves time. The stay is customarily 10 days after the motion for a new trial has been made. I only put it 20 days, because we know these defendants, certainly Ringling Bros., are responsible, and are not going to get away, and it would not be a question of any hazard. Our alternative is the posting of a bond. What is the difference? Our company is worth several million dollars anyway, and it would not have any ad-

vantage by the posting of a bond. I say several million—perhaps ten or fifteen million.

Mr. Marcus: I suggest, your Honor, that the stay be granted. I am willing to stipulate that it be granted until the motion for a new trial has been made and determined.

Mr. Combs: Suppose the court determines it in chambers, and sends out notice?

Mr. Marcus: I am not going to run out here and grab a couple of elephants.

The Court: Wouldn't 10 days be sufficient?

Mr. Combs: Yes, I think 10 days is fine. It isn't so long. We can, without prejudice, make the motion then.

The Court: 10 days?

Mr. Combs: Yes, 10 days.

The Court: Have you any objection?

Mr. Marcus: No.

Mr. Combs: 10 days after the ruling on the motion for a new trial.

The Court: Yes. [665]

[Endorsed]: Filed Aug. 30, 1944. [665]

[Endorsed]: No. 10877. United States Circuit Court of Appeals for the Ninth Circuit. Al G. Barnes Amusement Company, a corporation, sued as Al G. Barnes, Inc., and Ringling Bros.-Barnum & Bailey Combined Shows, Inc., Appellants, vs. America Olvera, also known as America Pollinger, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Central Division.

Filed September 22, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 10877

RINGLING BROS.-BARNUM & BAILEY COM-
BINED SHOWS, INC., a corporation, and AL G.
BARNES AMUSEMENT COMPANY, a corpora-
tion, sued herein as AL G. BARNES, INC., a cor-
poration,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA
OLVERA POLLINGER,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY ON APPEAL

Statement of Points Upon Which Appellants Intend to
Rely on Appeal, Pursuant to Rule 19, Subdivision 6
of the Rules of Circuit Court of Appeals for the
Ninth Circuit.

Appellants intend to rely upon the following points:

I.

The District Court erred:

(a) In denying appellant Al G. Barnes Amusement
Company's motion to dismiss the amended complaint.

(b) In denying appellant Ringling Bros.-Barnum &
Bailey Combined Shows, Inc.'s motion to dismiss the
amended complaint.

(c) In overruling appellants' objections to the intro-
duction of evidence.

(d) In overruling appellants' motion for nonsuit.

(e) In denying appellants' requests for directed verdict.

(f) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(g) In denying appellants' motions for a new trial.

On the grounds that the appellee's amended complaint does not state facts sufficient to constitute a cause of action against these appellants in this: That said amended complaint sets forth a contract between appellee and appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., which contains a clause releasing said appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. from any liability for damages which might occur to appellee in carrying out the provisions of the contract and providing that the relationship between the parties was that of independent contractor; that the terms of the contract and the relationship of the parties relieved appellants of any liability whatsoever; that the verdict impaired the obligation of contract, thus violating the constitutional rights of appellants.

II.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' requests for directed verdict.

(c) In failing to give appellants' Instructions Nos. 9-a, 32 and 33, reading respectively as follows:

"The elemental idea of 'negligence' is failure or omission—the failure or omission to do something

which should have been done. Negligence that is 'gross' involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness."

Appellants' Instruction 9-a.

"Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case."

Appellants' Instruction 32.

"'Wilful and wanton misconduct' is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons."

Appellants' Instruction 33.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

On the grounds that there was neither adequate allegation in appellee's amended complaint nor adequate proof adduced at the trial to support the verdict charging the appellants with gross or any other negligence and for the further reason that the purported amendment to the complaint inserting certain language which occurred while the case was on trial, was improper and any claim for gross negligence was barred by the statute of limitations, being the provisions of Part 2, Title 2, Chapter #3 of the California C. C. P., and in particular section 340 thereof.

III.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In refusing to give appellants' requested instructions on the subject of gross negligence or wilful misconduct, being appellants' instructions Nos. 9-a, 32 and 33.

(d) In giving of its own motion under the caption of plaintiff's instruction 14-a. the instruction which in effect instructed the jury to find for the appellee and against the appellants if, for any cause whatsoever, the appellants failed to catch the appellee in the net, and which said instruction, being a formula instruction, failed to include all of the affirmative defenses set up in appellants' answers, notably the defenses of fellow servant, assumption of risk, unavoidable accident, failure to inspect, and neglect of her own duties under contract.

(e) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(f) In denying appellants' motions for a new trial.

On the grounds that under the contract by which appellee was employed, appellee waived any action for damages on account of ordinary negligence of appellants. By giving Instruction No. 14-a the Court in effect abrogated the terms and conditions of the contract and by admitting evidence that a net was used as a part of the apparatus and that it was under the supervision and control of appellants, it abrogated the terms of the contract, made a modification thereof, and upon such modification allowed and directed a verdict in the event of ordinary negligence, or in fact in the event of the mere failure for any cause to catch appellee in the net. Further, in giving said formula instruction the Court failed to include all the defenses affirmatively pleaded in appellants' answers as they applied to any possible claim of negligence of appellants.

IV.

The District Court erred:

(a) In overruling appellants' motions for nonsuit.

(b) In refusing to give the following instructions: Defendants' Instructions Nos. 8, 20 and 21, reading as follows:

"You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her per-

formance, then you shall find in favor of defendants.”

Defendants’ Instruction 8.

“If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants.”

Defendants’ Instruction 20.

“If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master’s service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and

after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

(c) In denying both appellants' requests for a directed verdict.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(e) In denying appellants' motions for a new trial.

On the grounds that appellee under her contract and as an independent contractor, assumed the risks and hazards of her employment and her act as a trapeze artist in general.

V.

The District Court erred:

(a) In allowing evidence to be given over appellants' objections as to the construction and operation of the net.

(b) In instructing the jury concerning the operation of a net as follows:

"If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks

incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows."

Plaintiff's Instruction 14-a.

(c) In refusing to give defendants' proposed Instruction No. 5, reading as follows:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was in the knowledge of defendants and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants."

Defendants' Instruction 5.

(d) In denying appellants' motions for a new trial.

On the grounds that appellee charges no negligence in her amended complaint in relation to a net, and no net is mentioned in the contract of employment, whereas the Court allowed evidence over appellants' objection concerning the construction and operation of a net; that in opening up this field by allowing the evidence and instructing as the Court instructed in Instruction 14-a, the jury was directed to find in favor of the appellee even though no gross negligence was shown in so far as the operation of the net was concerned, on account of the

fact that the modification of the contract by the Court resultant, relieved the appellee of her contract against liability as to even ordinary negligence on the part of appellants, without any pleading of modification.

VI.

The District Court erred:

(a) In refusing to give the following instructions requested by appellants on the subject of master and servant:

"The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail and will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented."

Defendants' Instruction 10.

"If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an

unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

"You are hereby instructed that the plaintiff, America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees."

Defendants' Instruction 29.

(b) In prohibiting appellants from an opportunity to examine Instruction 14-a before the same was read and before the jury was sent out to deliberate, in that manner prohibiting appellants an opportunity of re-offering certain instructions on the subject of master and servant in addition to those set forth in (a) *supra*, under the facts and circumstances as set forth in the affidavit of Lee Combs in support of the motion for a new trial herein, said instructions being attached as exhibit to said Motion for New Trial.

(c) In refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus, being in particular appellants' proposed Instructions Nos. 3, 4, 6, 8, 20 and 21:

"I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendants but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants."

Defendants' Instruction 3.

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants."

Defendants' Instruction 4.

"If you find that the plaintiff, America Olvera, contracted by written contract to furnish a 'specialty act' in her customary manner for the defendant circus, and that the act had been prepared and arranged

by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees."

Defendants' Instruction 6.

"You are instructed that the plaintiff in her contract with Ringling Brothers—Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants."

Defendants' Instruction 8.

"If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants."

Defendants' Instruction 20.

"If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or

lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect."

Defendants' Instruction 21.

On the grounds that the Court instructed the jury that the appellee was an independent contractor and appellants independent contractees, and that the contract imposed a duty upon said appellee to inspect and supervise the erection of her apparatus, in which she admittedly failed, and on the further ground that the law as applied by the Court through instruction 14-a and the admission of evidence concerning the net, abrogated the independent contractor theory and in effect directed the jury to bring in a verdict for appellee on a finding of ordinary or no negligence at all, under a formula instruction.

VII.

The District Court erred:

(a) In denying appellants' motions for directed verdict.

(b) In overruling appellants' motions for nonsuit.

(c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment non obstante veredicto.

(d) In denying appellants' motions for a new trial.

(e) In refusing to give the following instruction:

"The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant."

Defendants' Instruction 19.

(f) In permitting counsel for the appellee to make the following statements to the jury during his argument in relation to the depositions shown to have been taken in a legal matter, and concerning the appellants' conduct toward appellee:

"That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as

was the case in this matter, of the plaintiff being represented by counsel."

Rep. Tr., p. 593, lines 9-13.

"It is obviously an out and out violation of their oaths."

Rep. Tr., p. 595, lines 1-2.

"Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olvera."

Rep. Tr., p. 595, lines 3-9.

"This is a printed contract that was given to her by Ringling Bros.-Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it."

Rep. Tr., p. 595, lines 22-25.

"It's furnished to them; it's given to them, and they are told to put their signature to it, and that's that."

Rep. Tr., p. 596, lines 11-12.

"They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net?"

Was it to catch her in safety?—Yes. Now, was that done in this case? No.”

Rep. Tr., p. 596, lines 19-24.

“We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That’s why I think you got the truth from this man.”

Rep. Tr., p. 598, lines 5-10.

“Here is a lady that has given the best part of her life to the rendition of her services for this company. * * * You give the best that’s in you. You give your life, or your services, and what do you get in the end? Probably just an empty life.”

Rep. Tr., p. 598, line 22

“ to p. 599, line 4.

“Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn’t.”

Rep. Tr., p. 600, lines 1-4.

“Gentlemen, you have probably reached the conclusion that there was a previous trial in this case, and there was. It’s in the record. And there is another trial now; and dont you think we dont have to do everything in our power, our legal power, to

convince this circus here that they ought to take care of people who have rendered their services to them, and have given of their life."

Rep. Tr., p. 600, lines 18-24.

"Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client."

Rep. Tr., p. 601, lines 23-24.

"He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it."

Rep. Tr., p. 628, lines 18-26.

"And counsel very dramatically says: Take it or leave it, because if you dont, and the contract is in some other form, whereby we assume some of your responsibility, some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words."

Rep. Tr., p. 628, line 26 to p. 629, line 5.

"Do you know why they put 'independent contractor' in that agreement, that printed contract? Counsel knows, and I know. He says there is no

relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there wouldn't be any lawsuit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would have been paid. This vicious contract, that was printed and delivered to her, it says 'Independent Contractor Agreement.' Independent for Ringling Bros. Circus. And that's the reason why they put that on there."

Rep. Tr., p. 629, lines 6-19.

"If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed a wee bit dramatic because of it, it has come from the sincerity of her soul."

Rep. Tr., p. 634, line 23 to p. 635, line 2.

On the grounds that the remarks above quoted and other remarks, the failure to give the instructions, and the conduct of the trial court, resulted in a bias and prejudice against appellants and an unfair trial to them, so gross that it could never be repaired by any direction or instruction of the court.

VIII.

The District Court erred:

(a) In denying appellants' motions to set aside the verdict for appellee and to enter a judgment in favor of appellants and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

On the grounds that the damages in this case are excessive in that the evidence fails to show any measure of appellee's earning power or how long she might have continued as a trapeze artist, and fails to show the extent of the injury as sufficient to support said verdict, and fails to show that appellee suffered any permanent disability for any other reason than her own refusal to submit to proper and adequate and recognized medical treatment at the time she first suffered her injury.

IX.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(d) In denying appellants' motions for a new trial.

On the grounds that there is no evidence in the entire record supporting the claim or from which it might be inferred that any gross negligence occurred in this case, either in the operation, management, erection or use of the trapeze or of the net involved in this case, and that the facts in this case do not support the verdict.

X.

The District Court erred:

(a) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

On the grounds that the court during the course of the trial made remarks prejudicial to appellants in the presence of and to the jury which affected and influenced the jury and created an attitude of bias and prejudice against appellants. Some of said remarks comprise the following:

"She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I dont mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?"

Rep. Tr., p. 16, lines 14-19.

"This is a very important phase of the case."

Rep. Tr., p. 17, line 9.

"You dont mean that a gift was made of the net?"

Rep. Tr. p. 23, lines 18-19.

"Maybe she does not understand the word 'establish'."

Rep. Tr., p. 30, lines 14-15.

"I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language."

Rep. Tr., p. 32, lines 20-22.

"However, this seems to be preliminary."

Rep. Tr., p. 37, line 20.

"I think she has explained very thoroughly what constitutes her act."

Rep. Tr., p. 38, lines 23-24.

"She said the net was too heavy."

Rep. Tr., p. 63, line 17.

The Court: "In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you."

Rep. Tr., p. 71, lines 2-5.

"The Court: I dont believe it would be a foot from the front of the net.

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isnt important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus: What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is.

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Combs: Will you measure from my wrist out to where these fingers? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body."

Rep. Tr., p. 71, line 25 to p. 73, line 12.

"You are referring to your right shoulder."

Rep. Tr., p. 74, line 18.

"You changed around to your left shoulder."

Rep. Tr., p. 74, line 21.

"You dont know whether it was the right shoulder?"

Rep. Tr., p. 74, lines 24-25.

"You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it."

Rep. Tr., p. 98, lines 9-12.

"Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up."

Rep. Tr., p. 128, lines 14-17.

"He has already said he heard a metallic noise something striking metal."

Rep. Tr., p. 134, line 26 to p. 135, line 1.

"I dont think you need answer that question. It is a rule of physics."

Rep. Tr., p. 146, lines 13-14.

"The Court: Dont argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court."

Rep. Tr., p. 147, lines 17-21.

"Dont answer that. The court will limit the cross examination on that point."

Rep. Tr., p. 149, lines 17-18.

"No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately."

Rep. Tr., p. 153, lines 22-24.

"Mr. Combs, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions."

Rep. Tr., p. 272, lines 14-16.

"I dont think it is material. The motion will be denied."

Rep. Tr., p. 333, lines 17-18.

"The Court: It has been stipulated that it is correct.

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, your Honor.

Mr. Marcus: It is a part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I dont think the question is proper, your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when

it had reached a certain position he held up his hand, and told them it was correct. That is my recollection of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in mind the admonition of the court and return when called by the bailiff."

Rep. Tr., p. 347, line 20 to p. 349, line 10.

"Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion."

Rep. Tr. p. 500, lines 10-12.

"Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty."

Rep. Tr., p. 500, lines 18-21.

"No, Mr. Combs, that is what he is attempting to explain."

Rep. Tr., p. 514, line 26 to p. 515, line 1.

“He means, have you placed it on the diagram? Was there anything else except that flying act you have referred to, above her rigging, or within the distance between the two center poles?”

Rep. Tr., p. 520, lines 10-13.

“Do the best you can, Mr. Miller.”

Rep. Tr., p. 521, line 13.

“He said he did not remember, Mr. Marcus.”

Rep. Tr., p. 527, line 2.

“There is no use asking him the question again. He just said he did not remember it.”

Rep. Tr., p. 527, lines 4-5.

“It is not necessary to rebut it under such circumstances.”

Rep. Tr., p. 575, lines 24-25.

XI.

The District Court erred:

(a) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment non obstante veredicto.

(b) In denying appellants' motions for a new trial.

(c) In admitting answers to questions concerning conversation in an attempted impeachment of Chandler Miller.

On the grounds that the Court allowed extended inquiry of witness Chandler Miller concerning an alleged conversation with appellee in which over objection, appellee's counsel recited a purported and erroneous sum-

mary of said conversation (Rep. Tr., p. 560, line 2 to p. 562, line 23), reiterated same with appellee (Rep. Tr., p. 571, line 20 to p. 575, line 25), which was followed by the comment by the Court: "It is not necessary to rebut it under such circumstances." Through the statements of counsel over objection, and the comments of the Court, the witness was improperly discredited before the jury.

XII.

The District Court erred:

(a) In refusing the motion to strike in the following matter:

"Q. But is it during all of the performances of the other acts before you?

A. No, sir, because some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I dont have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I dont have nothing to do with it," as a conclusion of the witness.

The Court: Denied."

Rep. Tr., p. 39, lines 17-26.

(b) In refusing to permit answers to the following questions:

"Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Dont answer that. The court will limit the cross examination on that point."

Rep. Tr., p. 146, lines 11-14.

“Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

The Court: I dont think you need answer that question. It is a rule of physics.”

[Rep. Tr., p. 146, lines 11-14.

“Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Olvera, would that indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts; assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain parts of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and,

therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied.”

Rep. Tr., p. 216, line 25 to p. 217, line 26.

COMBS & MURPHINE

GEORGE P. KINKLE

JOHN S. HUNT

Lee Combs

By Lee Combs

Attorneys for Appellants.

Received copy of the within Statement of Points, etc., this 20th day of September, 1944.

David C. Marcus

Attorney for Appellee.

[Endorsed]: Filed Sept. 22, 1944. Paul P. O'Brien, Clerk.

No. 10877

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RINGLING BROS., BARNUM & BAILEY COM-
BINED SHOWS, INC., a corporation, and AL G.
BARNES AMUSEMENT COMPANY, a corporation,
Appellants,

VS.

AMERICA OLVERA, also known as America Olvera
Pollinger,
Appellee.

SUPPLEMENTAL
TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

PAUL P. O'BRIEN,
CLERK

No. 10877

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Central Division

INDEX TO SUPPLEMENTAL TRANSCRIPT.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California

Central Division

No. 8367-B—Civil

AMERICA OLVERA, also known as America Olvera
Pollinger,

Plaintiff,

vs.

AL G. BARNES AMUSEMENT COMPANY, a corporation,
RINGLING BROS., BARNUM AND
BAILEY COMBINED SHOWS, INC., et al.,
Defendants.

MOTION

To the Defendants (Appellants) Above Named and to
Their Attorneys, O'Garrett, Combs & Murphine,
George P. Kinkle, John S. Hunt & Lee Combs.

You and Each of You, will please take notice that the
plaintiff (Appellee) America Olvera Pollinger, will on
the 15th day of January, 1945, at the hour of 10:00 A. M.
before the Honorable Campbell E. Beaumont, Judge Pre-
siding and as soon thereafter as counsel can be heard
move said Court for its order correcting the misstatements
and to include in said record on appeal the omissions as
more particularly set forth in the suggestion of the plain-
tiff herein, all as provided by Rule 75-H of the Rules of
Federal Procedure.

Dated: This 5th day of January, 1945.

DAVID C. MARCUS

Attorney for Plaintiff

Points and Authorities

75-H Rules of Federal Procedure

Miller vs. Miller, 114 Fed. 2nd. 596

Clawans vs. White, 112 Fed. 2nd. 189

United States vs. Broderbeck, 139 Fed. 2nd. 916

[Endorsed]: Filed Jan. 5, 1945.

[Title of District Court and Cause.]

SUGGESTIONS FOR DESIGNATION OF PORTIONS OF RECORD AND PROCEEDINGS FOR CORRECTION OF MISSTATEMENT TO BE CONTAINED AND CORRECTED IN THE RECORD ON APPEAL PURSUANT TO RULE 75-H OF RULES OF FEDERAL PROCEDURE.

Now comes the plaintiff (Appellee) in the above entitled cause and suggests to this Honorable Court that in the above entitled cause now pending on appeal before the United States Circuit Court of Appeals for the Ninth Circuit, that the transcript of record is incomplete and that the evidence in the particular as hereinafter designated has by error or accident been misstated which are a part of the record in said cause and are important and material for a proper understanding of the question raised on appeal and are not included in and made a part of said transcript of record.

The following portion of the record has been misstated: page 146 of the Reporter's Transcript, testimony and proceedings at the trial on direct examination by David C. Marcus, attorney for plaintiff of America Ol-

vera Pollinger, taken on January 4th, 1944; the Reporters' Transcript contains the following erroneous question:

"Q. Are you a naturalized American Citizen?"

That the correct question was:

"Q. Are you a Mexican National Citizen?"

On page 160 of the same record and witness the following answer was given:

"Q. By Mr. Marcus: Tell us how.

A. When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing any more, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter."

The record should have contained the following omission:

(Witness directing and indicating to Karl Pollinger to assist in demonstrating operation of trapeze.)

The following have been omitted entirely from the record on appeal which are material and important to a proper understanding of the questions raised. On January 18, 1944, defendants (Appellants) filed their (1) motion to set aside verdict and judgment non obstante veredicto and on January 25, 1944 filed their (2) motion for a new trial, supported by the affidavit of Lee Combs, attorney for Defendants (Appellants). That in said affidavit and

motions the said defendants and said Lee Combs, charged the Court with prejudicial misconduct with having

“Consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said grounds alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for the defendants called in at said time consultations at which instructions were discussed.”

That said attorney further charged this Court with the following:

“That the Court in holding private conferences concerning instructions with opposing counsel, left counsel for defendants uninformed of his intention regarding instructions, both as to the submission of plaintiff’s Instructions 14-a and in relation to the correction and alteration and change of defendants’ instruction.

That the change in these instructions and the rejection of certain instructions submitted on behalf of the defendants, which rejection counsel for defendants were first informed of upon the reading of the instructions to the jury, prohibited defendants’ counsel from re-submitting instructions to the jury on the master and servant doctrine; that affiant is informed and believes that the jury found against the defendants on the theory that the contract had been abrogated and waived by virtue of defendants supplying plaintiff with the net and operating same themselves and decided the case on ordinary negligence and against defendants on that question; that the course and conduct of the Court as indicated was one of

bias and prejudice and said course, consistently carried out, developed and created in the mind of the jury a prejudice against defendants with the result that the verdict rendered in the above entitled matter was the result of passion, prejudice and influence."

That said motions were argued by respective counsel before said Court on the 7th day of March, 1944, at which time the said Court rendered its oral opinion answering the said charges of said defendants of prejudicial misconduct and stating his grounds and basis for his ruling and thereupon denied said motion to set aside the verdict, etc., and continued under submission the motion for new trial.

That thereafter and on the 30th day of June, 1944, the said Court did deny defendants' motion for new trial. That at said time and place the said Court did render its further oral opinion answering the defendants' charges of bias and prejudice and stating his grounds and basis for its ruling as aforesaid.

That no part or portion of said oral opinion of said Court nor any part or portion of said grounds, basis and answer of said Court given and rendered in and made part of said record on the ruling of said motions were or are included in and made a part of said transcript of record on appeal. That each, every and all the foregoing omissions are material and important for the following reasons:

That said Court did answer said charges of prejudicial misconduct, bias and prejudice *picularly* within his own knowledge and that said charges were without *bais*, grounds and foundation. That plaintiff (Appellee) attaches herewith a transcribed copy of said oral opinion of said Court.

Wherefore plaintiff prays that this Court order and direct the correction of the testimony as herein above related and the inclusion in said record of the omissions all as before related and that a supplemental record thereof be ordered, prepared and transmitted by the Clerk of said Court to be included in the said record on appeal and thereupon to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of said record on appeal.

DAVID C. MARCUS
Attorney for Plaintiff

[Verified.]

[Endorsed]: Filed Jan. 5, 1945.

[Minutes: Monday, January 15, 1945]

Present: The Honorable Campbell E. Beaumont, District Judge.

This cause coming on for hearing motion of plaintiff for order correcting record on appeal, pursuant to motion and notice filed January 5, 1945; David C. Marcus, Esq., appearing as counsel for the plaintiff; Lee Combs, Esq., appearing as counsel for the defendants; H. A. Dewing, Court Reporter, being present:

Counsel argue. The Court denies motion as to suggestion commencing on page 2, line 5; grants suggestion commencing on page 2, line 20; and grants suggestion commencing on page 1, line 29, of document entitled "Suggestions for Designation of Portions of Record," etc., filed January 5, 1945.

And it is ordered that transcript of this hearing be included in record on appeal.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing seven pages contain full, true and correct copies of Motion; Suggestions for Designation of Portions of Record and Proceedings for Correction of Misstatement to be Contained and Corrected in the Record on Appeal Pursuant to Rule 75-H of Rules of Federal Procedure; and Minute Order Entered January 15, 1945 which, together with copy of Reporter's Transcript of Proceedings on January 15, 1945 and copy of Reporter's Transcript of Proceedings on Hearing of Motion of Defendants Filed January 16, 1944, to Set Aside Verdict and Judgment Entered in Favor of Defendants in Accordance with Motion for a Directed Verdict by Defendants Heretofore Made, and for Judgment Non Obstante Veredicto, transmitted herewith, constitute a supplement to the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing supplemental transcript amount to \$3.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 7 day of July, 1945.

[Seal]

EDMUND L. SMITH, Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

Hon. Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON HEARING OF MOTION OF DEFEND-
ANTS FILED JANUARY 16, 1944, TO SET
ASIDE VERDICT AND JUDGMENT EN-
TERED IN FAVOR OF DEFENDANTS IN AC-
CORDANCE WITH MOTION FOR A DI-
RECTED VERDICT BY DEFENDANTS HERE-
TOFORE MADE, AND FOR JUDGMENT NON
OBSTANTE VEREDICTO

Appearances:

David C. Marcus, Esq.,
for the plaintiff.

Lee Combs, Esq.,
for the defendants.

Los Angeles, California, Monday, March 6, 1944,
2:00 P. M.

* * * * * * * *

The Court: When the question came up with regard to the instructions on master and servant, my recollection is that it came up the first time when the three counsel were present,—two for the defendants and one for the plaintiff, and that the observation was made that since the ruling in the case that went to the Appellate Court, the instructions regarding master and servant were not applicable, and I think then I said, "Is is your desire, Mr. Combs, to withdraw them?" And you replied it was; but the court made no request that you do so. In twenty-three years on the bench, speaking of myself as a judge,

I have never requested the withdrawal of an instruction in my court.

Mr. Combs: That is substantially what the affidavit says, in any event.

The Court: I don't think it is, substantially. That is my recollection.

Mr. Combs: I don't like to disagree with your Honor. My impression is a little bit different.

The Court: That is my recollection.

Mr. Combs: I know we had a discussion on the 5th, in court. I put that date down. I know we also had one on the 8th.

The Court: I couldn't say about the dates. [2*]

Mr. Combs: Anyway, reasonably sound minds can be mistaken on those things.

The Court: That is true. Another thing that happened later on, when you said that you would withdraw them, you did not withdraw all of them. I looked through, and saw at least one—there may have been two—and I said, "Mr. Combs, you didn't withdraw all of your instructions," and you said, "No, I notice that I did not, but I think I will leave them in there. My theory is that the master and servant rule does not apply, but I have other counsel, and I think I should let them stay in." I said, "Very well, let them stay in." I refused to give them.

* * * * *

The Court: We can all be wrong in our recollection. When we were going over the instructions Mr. Marcus did not appear on time. We talked for some time; you and Mr. Corkery and I talked rather informally on some

*Page number appearing at top of Reporter's Transcript.

other matters for some time. Finally I said, "It isn't fair for one person to hold everybody up. While I have to be here all the time, you gentlemen don't have to be. It is Saturday morning," I said, "and I don't think we should wait for Mr. Marcus any longer." We began, and just as we began—we had not much more than started,—Mr. Marcus came in. I told Mr. Marcus we had started to discuss the instructions, and what had been said, I believe, about the [3] first instruction offered by him.

During the course of the discussion upon the instructions, which lasted from the time Mr. Marcus came in, which I would say was around twenty minutes after ten, or so, until, I think it was twenty minutes or a quarter to one, I suggested we go out and get some lunch. You said, "I will have to call up my family, because they are expecting me home." Mr. Marcus said he had illness in his family. I said, "Very well. We have gone over these instructions. After all, they are the court's instructions. I will go over them, and see what should be done."

During the time from, say about twenty minutes after ten, or so, until the time I mentioned when you left, we (Combs, Corkery and Marcus being present) spent all of that time discussing instructions. One of those instructions was 14. There were two or three others. You said, "Well, your Honor, this instruction is entirely wrong. It doesn't take into consideration the question of contributory negligence." I said, "When I was at my home last night I looked over the instructions, and I wrote out an instruction which I think covers that," and I read the instruction, which I had just written out in pencil. You said, "I don't think it covers everything. It doesn't cover their contributory negligence." I said,

"As I have framed it, on the question of proximate cause, I believe that is sufficient to cover it." [4]

Mr. Combs: I recall that discussion.

The Court: I said, "I think there are some decisions which would support that." Mr. Marcus then said, "If the court will reframe that instruction I will ask him to give it. I will withdraw this other instruction." Then I marked on there "May be withdrawn," thinking Mr. Marcus would come in, and maybe he would withdraw it, and that the court would reframe the instruction, which the court did. He told me later his wife had been very ill; his secretary was sick; and he had a great many things to do at home, so he did not come in to withdraw it. Mr. Marcus left it there. I had marked it "May be withdrawn." I think the marks are still on there; and I marked it "Refused." That is my recollection, Mr. Combs, of what happened.

Mr. Combs: There will be other things. For example, your Honor attempted to draw a formula instruction. We approached the bench.

The Court: That was not a formula instruction.

Mr. Combs: Mr. Marcus objected because of the repetition of the words "You shall find for the defendants."

The Court: That was not a formula instruction. What I was trying to do, and I so stated, was to set the issues out clearly, and there were two or three bases on which, if they determined the evidence in that respect, they could not find for the plaintiff. So I set these up; I think about [5] three of them, and then at the last I made some other statement; I said, "All of these terms will be defined." I showed it to you. I think the three of you were standing here, right in front of the bench. I said, "I want to put this up clearly to the jury, and I wrote

this out. Is there anyone who has any objection to this?" You looked at it and said, "No, I think that's all right." You turned to Mr. Corkery, and Mr. Corkery said, "No, I don't think that covers one element." Then Mr. Marcus said, "Your Honor, I want to call this to your attention, that these are like some of the railroad instructions that the attorneys for the railroad get out. They will say, 'If so-and-so, you must find for the defendant.' When the court gives all these instructions that places that before the jury." I said, "I realize that. I tried to avoid that. The court has tried to avoid it in preparing instructions all through these years; has tried to give the proper ones, because there are certain things on which the jury cannot find for the plaintiff." I said to Mr. Marcus, "So far as these things are concerned, if it is an unavoidable accident, or if it was an assumed risk that was incident to the nature of the business, and she had an accident, she could not recover, and there is no reason why it shouldn't be placed there. Mr. Marcus did not say anything. However, I did not give it. That was one I prepared entirely. It was not one that was attempted to be [6] a modification of the one presented by Mr. Marcus. It was only for the purpose of putting the issues clearly before the jury.

Mr. Combs: I think your Honor on the whole has very well recited the circumstances. I think I have a little different interpretation as to some of them, but in substance it is not a great deal different. I will drop the subject.

Los Angeles, California, Tuesday, March 7, 1944;
10:00 A. M.

The Court: The court intended to rule on all of these matters now, but will rule only upon the motion for judgment non obstante veredicto. I think that that motion should be denied, and it is. But as to the motion for a new trial, I am going to give further consideration to the instructions.

I endeavored to give the instructions which I thought covered the issues, but no matter how careful either counsel or the court may be in preparing instructions, we never know how proper they are until they are viewed in a more detached way, which comes when a motion for a new trial is made, or upon appeal.

But of one thing I am very, very sure, and that is there was no bias on my part, no prejudice whatsoever. I certainly never have sat in a case in which I have been prejudiced at all. There have been cases in which I have had some particular feeling, either that I was in favor of or adverse to a party, and I have disqualified myself. There have been other cases in which there has been some appearance, perhaps, for some party for whom I had been attorney maybe years before I had gone on the bench, or where, perhaps, some person during the time I was in the State court, and had to run for office, had been very active either for or against me in my election, or some other instance, where the possibility of a business affair which would not disqualify [8] me, but which, if unexplained, might indicate that there was some connection between the party and the court, and I have been so careful about those things that I have leaned backward. In fact I have been criticized at times for doing so, and for doing so under such circumstances.

sometimes, where it was said by those who did not like me that I was trying to escape a difficult situation by having some other judge try a case. Those are things which each judge has to determine for himself, and that I have done; but, certainly, I have never sat in any case in which I have been biased, or in which I have had any feeling of prejudice whatsoever, and I think, looking at it as I do, I would be the first one to know that.

However, I was impressed with what Mr. Combs had said, even if he did not question the sincerity of the court, that the court might, without its own knowledge, have done things which would indicate a leaning toward the plaintiff, and I tried to review some of those things. I can't think of any.

Certainly, during the course of the trial the judge has to rule, and at times to give an explanation for his rulings. The judges of the court are no more perfect than counsel are. They may say things which at the time appear to be entirely proper, which, when viewed later might carry with them some implications that were not intended; but in a protracted lawsuit that is likely to happen. There would never be a judgment that would be sustained if every [9] little word which came up, or every word which the court used, would be scrutinized in the strongest light. The purpose of courts is to do substantial justice. We can all make mistakes. We are all human, and as long as we are, we are going to make mistakes.

One of these things I recall, and I am sure all of you gentlemen will recall, is that in the discussions as to certain instructions—I think they were the instructions upon damages—there was an objection which was in writ-

ing, and which were filed. The court asked that they be filed, and they were filed. At that time they were not filed, and we were discussing them Saturday morning in my chambers, and I said I did not believe that the defendants' objection was sufficient; that it would not come within the provisions of the rule. Mr. Corkery asked if I had in mind that it wouldn't be specific enough. I said, "Yes, Mr. Corkery"—no doubt, you will recall I have done that throughout the trial—"I don't care anything about one party or another. It is all in the day's work for me, but I do want to see proper instructions. And I also like to see that the parties keep their record. If they want to make a record of the rulings of the court that, of course, they have a right to do."

The day before the trial of this case—I think it was on Monday—Mr. Marcus, before the beginning of the law and motion calendar, approached the lectern, and Mr. Combs [10] was there. He said Miss Olvera wanted to amend her complaint to ask for a greater amount of damages, and without waiting for Mr. Combs to object I said immediately "I think the court knows enough about this situation to deny that motion." I thought that the motion had not properly been presented, and that no affidavit had been made to show that there was any change, so that was my immediate reaction. I think throughout this trial both parties will find places throughout the record where I made suggestions to counsel, and statements that the court made regarding what its rulings were. In considering the motion for a new trial, of course the court will consider the evidence as presented in this case, not only on the question of damages, but upon all other questions.

As I say, it really was quite a surprise to find that I had been charged with bias and prejudice in this case, when I knew that I had none. I try to be fair to everyone, no matter who he is, and I considered the fact that Mr. Combs had said that without the court's knowing it even, prejudice might have been reflected. I knew I did not have any prejudice, but at the same time I had that argument in mind, so I read over parts of the transcript—not all of it; I did not read Mr. Pollinger's testimony, but I read Miss Olvera's.

Here is a time (referring to transcript of Miss Olvera's testimony at the trial), when I thought Mr. Marcus was taking up too much time with the examination of Miss Olvera on direct examination. I don't like to interfere. [11] I don't like to interrupt. I figure that the attorney knows more about this case than I do, but, of course, the court had this before it: The case had been tried once before, and I felt that the appellate court had crystallized the issues quite well, and that it had fixed the law of the case upon certain of the issues. So, after a long answer, beginning on page 5, line 7, and continuing over to page 6, line 2, I interrupted Mr. Marcus, as follows:

"The Court: Mr. Marcus, do you think it is important to go through these details, until she did attain the position of a recognized trapeze artist?"

"Mr. Marcus: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

"The Court: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don't think it is important."

That was for the purpose of saving time. It is the duty of the court to direct the progress of the trial. Page 8 the court again interrupted. A question had been asked by Mr. Marcus, and Mr. Combs said:

"We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. Circus.

"The Court: Isn't that sufficient? [12]

"Mr. Marcus: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

"Mr. Combs: I don't know that. If you will ask her.

"The Court: Let me ask you: In view of the appellate court's decision in this matter is that important?

"Mr. Marcus: I don't think so.

"Mr. Combs: No."

There we were all in agreement, but the question was asked by the court for the purpose of saving time, a proper direction, as the court believed, of the course of the trial, and without any thought as to whom it should benefit at all. That did not have any part in the court's mind. On page 9 a question was asked by Mr. Marcus:

"Q—Relate the conversation to the jury, at the time the contract was executed.

"The Court: What is the importance of it when you have the contract received in evidence?"

It might have been Mr. Marcus had something very important in mind, but I did not consider it was, and that is the reason I asked him the question, and, as

shown by statements of counsel as follows, they agreed with the court:

"Mr. Combs: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes Show; that she was received there, and employed by that show under the terms of that contract." [13]

On page 10 the court said:

"Might it not be agreed that she was an independent contractor?"

"Mr. Combs: Yes.

"Mr. Marcus: So stipulated, your Honor."

On page 28, Mr. Combs stated:

"I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated without having to make it each time, after each question.

"The Court: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

"Mr. Marcus: Yes."

I think that is another indication of the readiness of the court to agree to anything that would preserve the record, in this instance in favor of the defendants. On page 36, line 24:

"Mr. Combs: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct.

"The Court: The court will admonish counsel to avoid leading questions."

Which I think I did from time to time throughout the trial. Mr. Marcus did ask a number of leading ques-

tions, as lots of counsel do. Ordinarily they are not objected to unless they get right down to a very important matter or very important issue, and Mr. Combs took that position, [14] a time or two, that while the questions were leading, they happened to be more preliminary than otherwise, and did not get right down to the important parts. In fact, right on the same page, line 19, is the following:

“The Court: Mr. Marcus, I wish you would bear in mind the court’s admonition. However, this seems to be preliminary.

“Mr. Combs: I don’t care about it unless it gets up to the point where it is critical.”

Then I added:

“A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them.”

I had in mind, of course, objections made where they were leading, and that it was the duty of the court to sustain them. On page 40, line 22, an answer was made by Miss Olvera, and Mr. Combs stated:

“If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel’s questions are leading and suggestive.

“The Court: You may make your motion to strike out, if you think you would like to have the court consider it.

“Mr. Combs: I don’t want to hamper the speed, of course, [15] of this trial, but I have to combat with this

persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can't anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

"The Court: Would you read Mr. Combs' statement?"

"(Statement read by the reporter.)"

"The Court: Proceed."

The court still thought he should proceed, as he had given Mr. Combs an opportunity there to make his motion if he desired, as I would any counsel in any case. I think you will recall, during the course of the trial, a matter which occurred out of the presence of the jury, when the court itself had excused the jury, there was some statement about the ruling of the court, and that the court's mind was already made up. I explained to Mr. Combs that the court's mind was not made up; that the court did not foreclose its mind until the matter had been entirely submitted; and he had a right to argue the matter at any time. I don't recall about that, but I think I ruled in favor of Mr. Combs. But, in any event, before the jury returned, I think I called attention to the fact that Mr. Combs had made this statement, and he very properly stated that during the course of the trial, in the heat of it, statements are made which are not given full consideration, and asked to apologize, and did apologize to the court. I said the [16] apology was accepted, as the court understood these things; and the court does understand them, and is always inclined to be very lenient with the statements that are made under such circumstances. But I think considered statements that are made otherwise should be given their full credit, always taking, of course, into consideration the fact that any of us may be mistaken as to matters of

memory. Page 68, line 22, a question was being asked by Mr. Combs of the witness Olvera:

"You don't mean to give the jury the impression—"

Then I interrupted Mr. Combs, stating:

"I think you are asking about what the custom was when she was performing her act. She was referring to the very last act.

"Mr. Combs: What I am trying to bring out is the fact that they remained there stationary right in the center under the trapeze during the entire period of time.

"The Court: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

"Mr. Combs: Let me see if I can clear that up."

There the court was endeavoring to clear up a point, where I believed Mr. Combs was asking questions about one thing and the witness was answering about another. There is another question on the same page, line 8, where Mr. [17] Marcus interposed this objection:

"Mr. Marcus: I object to that as calling for the conclusion of the witness.

"The Court: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled."

On page 74, line 16, Miss Olvera answered:

"Yes, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men."

She at that time pointed to one of her shoulders. I said:

"You are referring to your right shoulder?"

"A—Yes, right here; not on the shoulder. I struck in here.

"The Court: You changed around to your left shoulder.

"Q—By Mr. Combs: Was it his right shoulder?

"A—I try to show you. I don't remember.

"Q—By the Court: You don't know whether it was the right shoulder?

"A—No, I don't."

There I noticed that she had changed from one shoulder to the other, and pointed to it, and I thought it was proper to call that to the attention of the attorneys, and I wasn't interested in whose favor it was. I just thought that was an inconsistency or discrepancy that attention should be called to. [18]

Page 86, line 19, the following appears:

"The Court: In any event it calls for the conclusion of the witness. Mr. Combs, you don't mind the court suggesting something?

"Mr. Combs: Not a bit.

"The Court: In your questions you have used the phrase a number of times 'I take it' such and such. Just ask the question directly, and I think it will be more definite.

"Mr. Combs: I will withdraw it and reframe it."

I think afterwards Mr. Combs did change that. A time or two he used the same expression, but he changed it, as I stated I believed it would be better to ask the question directly. I have never hesitated to make suggestions to counsel during the course of the trial, because I only had in mind one thing, and that was to see that all the parties got a fair trial. I may say that

judges vary in their actions in the trial of a case. Some judges take a very large part in the trial of a case, and some hardly say anything, but judges are different, just as lawyers are, and they have to do these things according to their own views and their own temperaments. On page 87 Mr. Combs had asked a question, to which there was an objection, and Mr. Combs said:

"Mr. Combs: Just answer the question; if she saw anybody do anything.

"Mr. Marcus: Ask her that question.

"Mr. Combs: Did you?" [19]

Then the court asked to have the question read.

"The Court: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained."

On page 88 there is another example. The court noticed a mistake in the use of a word, and thought it should be called to the attention of the attorneys. It was on cross examination. On line 8, Mr. Combs said:

"Q—Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn't it?

"A—What?

"The Court: Read the question, Mr. Dewing.

"(Question read by the reporter.)

"The Court: Do you mean act or action?

"Mr. Combs: I mean act.

"The Court: Reframe your question."

Mr. Combs then reframed the question, and used the word "act." I thought he meant "act," but that he had inadvertently used the wrong word. That happens to all of us. I think there is no one who does not use the wrong word at times. For example, I read an instruction, in which I used a word I did not intend. It was called to my attention. I had no [20] knowledge of it. But that frequently happens; not only happens in the course of ordinary conversation, but in court. I have had attorneys refer to plaintiff when they meant defendant, and vice versa; things just exactly the opposite. On page 90 there was a discussion between Mr. Marcus and Mr. Combs. I thought the matter was clear. Line 16:

"The Court: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn't it, Mr. Combs?"

"Mr. Combs: Certainly, your Honor.

"Mr. Marcus: If he did, your Honor. I don't believe the question includes that statement.

"Mr. Combs: We will just amend it to include it then.

"Mr. Marcus: Thank you."

There was a place where the court desired to make the point entirely clear. So, in reading over this, I can't see that there is any reflection of an indication of bias. I know there was none. Nobody would know that better than myself; and I know there was none. Even considering the points which were brought out by Mr. Combs, considering all of those things, I can say I don't think there was any indication of bias, and I don't see how there could have been bias, because none existed.

I did not refer to all of the matters that I saw in the testimony of Miss Olvera which I thought might

have some bearing on that point, but I don't think the court will [21] make any further statement in regard to the matter now, except that I am going to give very serious consideration to whether or not the instructions were justified by the law and the evidence, and when the court has done so it will make its ruling.

Mr. Combs: Would you like to keep that copy of the transcript for a while?

The Court: No, I don't believe it will serve any purpose. If I need it, Mr. Combs, I shall ask Mr. Dewing if he will read over certain parts of the testimony, or I may have it written up for me. I may say that I did have Mr. Dewing read for me that part which had to do with the interruption of counsel for the defendant, and certainly there was nothing in there that, in the court's opinion, would justify the conclusion that Mr. Combs has reached.

There occurs to me another thing which I would like to mention, and that is the reading of defendants' instruction No. 4, and then advising the jury to disregard it, and reading it again as the court corrected it. Immediately thereafter the court read a part of instruction 5, which was given by the court. The court was of the opinion that it was unnecessary to add that part, which was marked out. The court failed to give that part of the instruction, and it was so indicated, that it was given as modified, and gave instruction 4 as modified.

Now, as to stopping for five minutes or so, again I [22] dwell upon the imperfection of judges, the same as the lawyers. When I went over the instructions I decided to give instruction 4 as it was offered. Then,

in reading it, it had a different sound, had a different effect, and I felt that it was improper to give it as it had been presented, and I considered the propriety of changing it, and finally I did make the changes which appear upon the face of the instruction. It took some little time for the court to determine that, and also to make the changes, but that is not unusual in cases. It isn't the ordinary thing, it is true, because ordinarily among judges—and that applies to myself—generally judges who prepare the instructions give them just as they are prepared. And in a case it sometimes happens a judge may decide to change the instruction, even after he has given it; and that's what happened in this case, and I think it was not prejudicial, and there certainly was no intent on the part of the court except to make the instruction conform to what the court believed the law is.

I think the court has covered most of these matters. When this affidavit was filed by Mr. Combs I thought I might have some other judge sit upon this motion, but I came to the conclusion, and this after consulting a judge of our court, who has had long experience here, that when it came to the matter of a motion for a new trial that I was really the only judge who could and should act upon the motion. It [23] would be different upon the trial of a case in which a judge is charged with being prejudiced, at the beginning of the case. Then it would be entirely proper, and it is the law, if there is an affidavit of prejudice filed, that some other judge should sit upon it.

Also, when I viewed Mr. Combs' affidavit very carefully, I came to the conclusion that he was not making a direct and general statement of bias and prejudice on the part of the judge of the court, but that such bias and prejudice had resulted from certain facts which he had set out in the affidavit.

Notwithstanding all of these matters, I still desire to give further time and consideration to the question of the instructions.

So far as the evidence is concerned, I am convinced that it was a case which should have been submitted to the jury. I think that the motions for a non-suit and an instructed verdict were properly denied, and that the same rule of law applies to the judgment non obstante veredicto, as it does to the motions for a directed verdict. The court must consider them in the same light. I believe, although I have not looked at it for some time, that there is a case in 210 Cal., *Union Bank and Trust Company v. Hunt*, which is a very clear exposition of the proper consideration of motions such as are before the court today.

Referring to the Appellate Court decision upon the [24] question of the evidence presented in the other case, Mr. Marcus read all of the part which the court now expects to read. Reading from the decision (119 Fed. (2d) 584):

"Appellants admit that the stock control of both circuses was in a common trust, though each has an in-

dependent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes' circus was of 'its,' Ringling's, circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances; that they were caused by either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling management."

As I view that, that is a direct statement regarding the question of gross negligence, as well as ordinary negligence; but it says that the jury properly could infer that the injuries were caused by either gross negligence or ordinary negligence.

The part read by Mr. Combs was the further statement that "There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing" materials, and so forth. So while we have the direct statement here of Judge Mathews that in his opinion there was no evidence either of gross or ordinary negligence in the case, on the other hand we have [25] the opinion of the majority members of the court that there was evidence from which the jury properly could infer that the injuries were caused either by gross negligence or ordinary negligence.

The matter may now stand submitted.

[Endorsed]: Filed Jun. 7, 1945. [26]

[Title of District Court and Cause.]

Hon. Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

David C. Marcus, Esq.,
for plaintiff.

Lee Combs, Esq.,
for defendants.

Los Angeles, California, Monday, January 15, 1945,
10 A. M.

Mr. Marcus: Your Honor, this is a motion pursuant to Rule 75-H of the Rules of Federal Procedure, for the purpose of correcting certain errors in the record, and for the purpose of designating further portions of the record to be incorporated in the printed record on appeal.

The first mistake in the transcript is as follows: On page 146 of the printed record on appeal the question was asked by counsel for the plaintiff:

"Q—Are you a naturalized American citizen?"

The correct question was:

"Q—Are you a Mexican National citizen?"

I don't think there is any dispute about the fact, and apparently there must have been some error in the transcription of it. The next correction is on page 160 of the record. The witness was asked:

"Q—By Mr. Marcus: Tell us how."

In reference to the operation of the trapeze. At that time the trapeze was in court, and was in the position of being demonstrated. She replied:

“A—When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other one on top was twisted, and with a jerk, when I swing out of the lines, it lengthened itself, and the trapeze never gave a swing anymore, like this. I wish I never fell [2] down, but that swing to one side, that way, throw me out, because one line wasn’t straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter.”

At the end of that answer the record should have indicated that the witness was directing her husband, Karl Pollinger, to assist in demonstrating the operation of the trapeze. A reading of the record preceding that question and answer will readily disclose that was the situation. The trapeze was being demonstrated by the witness and her counsel. The next portion which I consider of particular importance in the record is the failure to include the court’s observations, and its reasons for the denial of the motion to set aside the verdict and judgment non obstante veredicto. The grounds of the motion, as shown by the affidavit, and the portions that are important in this motion, in this affidavit recite certain charges of bias and prejudice, and those are directed at the trial court. They are rather serious in nature. I presume the court has them in mind, and I shall not repeat them.

In denying the motion for judgment non obstante veredicto the court took some considerable time, effort and pains in pointing out in the record itself wherein the court felt, and in its own mind believed that there was

no bias or prejudice in the court's mind at any time during the course of the trial. [3]

The Court: I think you are mistaken as to one point. The court knew in its own mind that there was no bias or prejudice, and pointed out in the record what it believed to be the portions of the record which showed why any person, in the court's opinion, would think there was no bias or prejudice. Your statement was not exactly correct.

Mr. Marcus: In designating the portions of the transcript on appeal, I believe, from the notice given to the clerk and reporter for the preparation of the record, that that should have been included, because the request for the transcript was broad enough so that it would have included the court's observations made at that time. Those were not included in the transcript on appeal. Furthermore, at the time of the court's denial of the motion for a new trial the court made further observations in the matter, and in counsel's opinion answered the charges contained in the affidavit. I might state, parenthetically, your Honor, that the defendants have made much of that charge on their appeal. We have received their opening brief. In fairness to the court and to counsel and to the parties litigant I feel that it is important, and of the utmost importance, to include that portion of the record in the transcript. [4]

The Court: Let me see if I have this correctly in mind, Mr. Marcus. There are two parts of the record which you believe should be changed, and that there should be included the statements of the court at the time of the denial of the motion for judgment non obstante veredicto, and the statements of the court at the time of the denial of the motion for a new trial?

Mr. Marcus: That is correct.

The Court: Is there any objection?

Mr. Combs: Yes, there are objections, your Honor. The first point is the point that counsel desires to change the transcript as it now stands on the subject of citizenship. As a matter of fact, the real fact of the matter, and which we are willing to stipulate, is that America Olvera is a Mexican citizen, who married a German citizen. What the legal effect of that is I have not ascertained; whether she is a German citizen by reason of that marriage, or a Mexican citizen, I don't know. Suffice it to say, there is a diversity of citizenship in this case, and there would still be a diversity of citizenship, if she were an American citizen. If the record is changed, it should be changed to show she is a Mexican citizen married to a German citizen. What legal consequences follow from that I don't know.

The Court: Upon that point, I think the court should decide the question as to the first motion, which is [5] to correct it to show: Are you a Mexican National citizen? What have you to say about that, Mr. Marcus?

Mr. Marcus: Your Honor, that was the question I asked: Are you a Mexican National citizen?

The Court: What do you recall about the form of the question, Mr. Combs?

Mr. Combs: I don't know. My impression is that the question was: Are you a naturalized American citizen? I don't care what the form of the question was. We will stipulate she is a Mexican citizen married to a German citizen, and let the cards fall where they may. We have made no point of it.

Mr. Marcus: That isn't the point, to stipulate to an addition to the record. My concern is to have the question correct.

Mr. Combs: My recollection is that the question is correct. You asked that question and expected a negative answer, and in the stress of the trial you did not get it. If we are going to correct the record to speak the truth it seems we should have the additional factor. Who knows but what I would have asked a little more as to her citizenship on cross examination? I am not infallible. It meant nothing to me at the time of the trial. I knew she could establish her grounds of jurisdiction in the federal court. In fact, in the opening brief I say: America Olvera, an alien. That gives her jurisdiction. That [6] is a jurisdictional statement, and it is enough under the federal rules.

The Court: That, however, might not be sufficient, if the record shows it, because there are cases in which the court, on appeal, found the statement in the record, and has acted upon that. I know of one particular case.

Mr. Marcus: Your Honor, counsel made a motion for a change of venue himself from the state to the federal court, that is, counsel for the defendant, based upon the ground of diversity of citizenship, in that the plaintiff was a Mexican citizen, and the defendants were American residents.

The Court: The question now is whether the record should be changed to change the question. My recollection is certainly not definite in regard to it. I don't recall about it.

Mr. Combs: My recollection is he did ask that question. It is vague; so vague that I do not want to base any statement on it. I think we all thought she answered that question, and it was passed, and none of us thought of it again, but I am not going to stand on a point of that character. I have conceded in my opening brief that she is an alien, and she is. What happened

was, counsel mentioned that she was a single woman, as I recall, when she first filed action. Then she married Pollinger.

Mr. Marcus: Counsel is in error.

Mr. Combs: Maybe I am in error on that.

Mr Marcus: Your [7] Honor, the question is definite and certain in my mind. There are no doubts about it. I asked her: Are you a Mexican National citizen? for the purpose of laying the foundation as to diversity of citizenship. It wasn't incumbent upon the defendants to prove that. It was incumbent upon the plaintiff to prove it and the record will show that at the prior trial that was in the transcript. At the time, I asked identically the same question of the witness: Are you a Mexican National citizen?

The Court: As a matter of interest, do you have with you that transcript on the prior trial?

Mr. Marcus: No, I did not bring it with me, your Honor, but I can get it.

The Court: It is quite possible that the reporter may have misunderstood, because, after all, the vowel sounds of a number of vowels in there are quite alike. The record should speak the truth. The court is very reluctant to change a reporter's transcript. Mr. Dewing is a good reporter, but he is subject to mistakes as well as anybody, and he is very willing to admit it if he does make a mistake. He has looked at his record, and his notes seem to be clear. I think it would help somewhat if you had the record here, and would refer to it. As I recall, you had the record before you of the other trial, and both you and Mr. Combs referred to it in asking certain questions, probably for the sake of conciseness and covering [8] the same ground which you thought proper to be covered.

Mr. Marcus: I did, sir.

The Clerk: I can get the transcript in a few minutes.

Mr. Marcus: The truth is, your Honor, she is a Mexican National citizen.

The Court: Here is the record.

Mr. Combs: I will always regret that I did not examine her more fully on that subject, for whatever benefit it would have been, to display the fact that her husband was a German citizen. There are some cases which prohibit aliens maintaining an action. I doubt if this is such a case. I regret I did not examine into the subject, so as to straighten out the record on that subject.

Mr. Marcus: The first page of the record indicates that the following questions were asked:

"A—I was born June 8, 1906.

"Q—By Mr. Marcus: Where at?

"A—Mazatlan, Sinaloa, Mexico.

"Q—Sinaloa, that is a state?

"A—That is a state."

That is part of it.

The Court: There seems to be considerable in that record. Perhaps you had better pass that point, and take up the other.

Mr. Combs: The next point is pertaining to adding an explanation at the end of certain testimony, to the [9] following effect:

"(Witness directing and indicating to Karl Pollinger to assist in demonstrating operation of trapeze.)"

There wasn't any such actual performance going on at that time, within my recollection. It is true that Pollinger stood here during a substantial part of that evidence, part of the time, and held up the trapeze, but the

record evidences that fact, because I made an objection to it myself, and made a statement to the court. Mr. Pollinger and Mr. Marcus were holding the trapeze up in a manner which I considered was calculated deliberately to induce the jury to believe that the 8-hook could hang up there in the manner claimed by the defendant. I approached the bench and made a statement to the court. That was the only reference, as I recall, of the presence of Mr. Pollinger.

The statements of fact appear in the record. The testimony and circumstances in the trial can only be reflected by the words and language used by the parties involved. To insert explanatory matter in one case would require its insertion in numerous others. Then going one step further, it would require the intonation of the voices. We all know we can say a thing one way, and by intonation make its effect considerably different than what the actual words say. Appellate courts are all cognizant of that fact. That is why certain of the controverted [10] facts ordinarily, unless so impossible as not to be believed, or some other such limitations, are viewed in favor of the appellee.

We think it would be not only an error in this particular instance itself, but a very remarkable thing, indeed, to select one piece of testimony and insert explanatory matter, almost a year after the trial. I imagine it is a year. It was January 15th; exactly a year from the time the verdict came in. So I certainly would strenuously resist any such insertion of explanatory matter. It isn't claimed that any language was left out. The language speaks for itself. Maybe it doesn't mean what I think it means. I might be able to argue that. I don't know.

Mr. Marcus: I want to refer to the record itself immediately prior to the asking of that question. Referring to pages 158, 159 and 160. I will just read a portion of it.

"Q—Is there any way of making the bottom bar level in the event that this 8-hook overlaps, as it does here?

"Mr. Combs: I object to that as calling for the conclusion of the witness.

"Mr. Marcus If she knows.

"The Court She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't [11] mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?

"A—I would like to hear it again."

There was an objection that it was leading and suggestive.

"Q—By Mr. Marcus: Will you tell us how, when the hook is in the position that it is—

"The Court: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

"Mr. Marcus: The 8-hook overlaps the ring on the upper bar.

"The Court: The top part of the 8-hook?

"Mr. Marcus: That is right.

"The Court: Turn it around so the jury may see it. Now proceed with your examination.

"Q—By Mr. Marcus: Tell me how the lower bar can remain level when one of the lines overlaps, the way we have indicated here.

"Mr. Combs: I object to that as calling for the conclusion of the witness.

"The Court: Overruled. You may answer.

"A—I know now how it would be, from experience.

"Q—By Mr. Marcus: Tell us how.

"A—When I went up in my trapeze, the bar was perfectly level, when the hook overlapped itself, the other [12] one on top was twisted, and with a jerk, when I swing one of the lines, it lengthened itself, and the trapeze never gave a swing anymore, like this. I wish I never fell down, but that swing to one side, that way, throw me out, because one line wasn't straight in the bar from the top; my husband lower one side to lead up to the other one which was shorter.

"The Court: Do the members of the jury understand the answer?

"A Juror: Is there any method of checking before the performance to see that everything is O. K.?

"The Court: Is there any objection to that question on behalf of either party?

"Mr. Combs: We have no objection to that.

"The Court: Answer the question."

Then on page 162.

"Q—By Mr. Marcus: Is this your apparatus?

"A—Yes." etc.

The record is replete with testimony at that time indicating that the trapeze was being demonstrated and used in the court, and that she at that time requested Mr. Pollinger, who was running back and forth helping me, and holding up the trapeze, or lowering a line, or whatever he did, as the record indicates at that time, and she said, "My husband lower one side to lead up to the other one which was shorter." [13]

The Court: I do not feel inclined to grant that motion. I can't recall it. I know at the time of the examination of Mrs. Pollinger—I don't know how long it continued, but during part of the examination Mr. Pollinger held up the trapeze and the bar above, and it was in that position when the court directed him to turn it so that the jury could see it; but I certainly do not recall that there was any such situation which would warrant the court now in making the statement which is requested. By that I don't mean to say that it did not happen; it is just that my recollection is not sufficient, and it has not been refreshed by anything which would indicate that the motion should be granted. That part of the motion is denied.

Mr. Combs: On the third point I want to take issue with counsel, in a friendly way, and will state that he is slightly mistaken as to the emphasis we place on the point of bias and prejudice in this case. I am not in a position, or at liberty, to disclose exactly what our views are on that at the present time, because we have to present it to the Appellate Court. I will say that an indication on the subject is that that subjects enjoys, on page 83 of an 86-page brief, eleven lines. That is the entire argument on that subject. It is true that in our points on appeal we quote a number of statements by the court which we consider prejudicial, in establishing bias against us; but those are only referred to. So much for that. I am only making [14] that as a statement to give some indication of what the preparers of this brief must have thought of the weight of that point, standing of itself.

It is true I mentioned in the argument on the subject of instruction that subject in relation to our inability to prepare for the instruction, but on that subject I

opened with what I considered a graceful and proper statement on the part of counsel to this effect: We have no quarrel with the trial court instructing the jury in conformity and in accordance with the law. So if the court wanted to give an instruction, he could give any he wanted to; he had the right to do so. Our only objection to that is that we did not have an opportunity to adequately meet the instruction. That is all I want to say on that subject.

As to statements in the opinion, statements by the court, ruling on the motion for a new trial, no duty rests on our shoulders to produce them. We might have been taxed with that portion of the record; we might have been taxed with the costs in connection with the record on that. The proof of the pudding is that the court denied the motion. What the court does in denying the motion is immaterial. The court denied it, and he certainly must not have believed our position, or he would not have denied it. So that matter did not have any proper place in the appeal.

I want to say one thing more about counsel's diligence in this matter. Rule 75 provides the manner in which a [15] transcript is to be corrected and prepared. It states that within ten days after the designation has been served the other party may have an opportunity to serve his designation. We designated the entire record. I enumerated in that designation all the shorthand report of the entire trial, and I think I included some special things we wanted, when we gave notice of our points on appeal; and on the filing of the record we stated that this was all of the record in the case. We understand the law on this to be that counsel must be reasonably diligent. If he does not think it is all of the record

in the case to present his points, he must present his points at this time.

This is a very belated time to make a motion to add matter to the record. The opening brief has been filed. It was filed on the 4th of January, and time is running to file a reply brief. The transcript has been filed for a substantial period of time. We don't believe this is timely made; but the prime point is that the opinion of the court denying a motion for a new trial is immaterial. It isn't even part of the record; it isn't part of the record on appeal. The fact is, we got the order in denying it; and it was denied. That seems to me like the acme of achievement. You can't do better than perfect. It was denied.

The Court: The denial of the motion for a new trial? [16]

Mr. Combs: Yes. He is asking for the opinion.

The Court: I think it is proper that this be concluded. The motion is granted. That applies both to the remarks of the court at the time of the denial of judgment non obstante veredicto, and the remarks of the court at the time of the denial of the motion for a new trial. You included them both in your motion?

Mr. Marcus: I did, your Honor.

The Court: That leaves one other point.

Mr. Marcus: Your Honor, it may have been that I had the complaint in mind at the time, as to the allegation of nationality.

The Court: Look at the complaint and see what that says.

Mr. Combs: If I may address the court?

The Court: Yes.

Mr. Combs: I might state that included in that request we would like also to be the transcript of the hearing—the statements of counsel and court in this proceeding, too, since it is in the nature of a special proceeding, and I think the whole matter should go before the court. We want particularly the objection to the motion, and the application made.

The Court: That is, this present application?

Mr. Combs: Yes, your Honor.

The Court: You are entitled to the benefit of your [17] objection, and that may appear either through the record of the reporter or through the clerk's record. It is entirely satisfactory to the court that the entire transcript of this morning be included. I think that the parties are entitled to their proper motions and to their objections, for whatever benefit it is to them. I have an idea that both parties will be protected by the filing of the motions, and the rulings of the court showing why the motions were granted over an objection where an objection was made; but probably all the parties would desire, or the Circuit Court would desire, to have the record. This court has no desire to deprive either party of an opportunity to present its position. I am not familiar with the procedure on appeals. Those are matters that seldom come before the court. There was an amendment filed to the complaint?

Mr. Marcus: That is right. Will your Honor give me a few minutes' time to look at this record? Your Honor, the only portion of that record I find relative to her citizenship is the fact that she was asked the question in the original transcript:

“Q—Where were you born?

“A—Mazatlan, Sinaloa, Mexico.”

I will check the record further; but with reference to the question that was asked at the time, I have a very distinct recollection that she was asked that very question: Are you a Mexican National citizen? Her answer was: Yes. [18] Miss Olvera is in the courtroom, and if your Honor wishes to interrogate her on that she will be happy to take the stand. In fact, she was the one who discovered that error when I handed her the transcript, and she stated she was not asked that.

Mr. Combs: There were many inconsistencies in her testimony. I would dislike the task of enumerating all of them, there are so many.

Mr. Marcus: There is no question as to the fact, your Honor, that she is a Mexican citizen, and was born in Mexico.

Mr. Combs: I am not so sure myself of that.

Mr. Marcus: There is one sure thing; she is not a naturalized American citizen. That is definite and certain.

The Court: Do you have the pre-trial order?

Mr. Marcus: Yes, I have, your Honor.

The Court: Did you look at that?

Mr. Marcus: I did examine that just now.

The Court: Is there any statement in there about citizenship?

Mr. Marcus: The following are the remarks that are in the record, after discussing the pleadings: It was stipulated by plaintiff and defendant that the contract of September 24, 1936, in suit, was entered into by the said parties— [19]

The Court: You don't need to read any of it except about the citizenship, if it is in there, Mr. Marcus.

Mr. Marcus: There is nothing further, your Honor.

The Court: The court will grant that motion. Clearly she is not a naturalized American citizen and that is not disputed. The court has heretofore made some comment upon the similarity in the sound of the words. At times even counsel don't speak distinctly, and it is a mistake that might well be made. In view of the fact that it is contrary to the fact, as admitted by all the parties, and the definite recollection of Mr. Marcus, the court believes the motion should be granted, and it is granted.

Mr. Combs: I take it that the court has still no independent recollection in the matter?

The Court: I have no independent recollection, and I do not purport to base my ruling upon any recollection whatever.

Mr. Combs: I thought that was right.

The Court: I believe that disposes of all the matters.

Mr. Combs: May we have the order include the transcript of this hearing, also? I have stated my objection in the course of the hearing, and it will be difficult to get it in in any other way.

The Court: There is no objection?

Mr. Marcus: I have no objection. Only it comes [20] to the question of paying for it.

Mr. Combs: You pay for your part and we will pay for ours.

The Court: So ordered.

[Endorsed]: Filed Jun. 7, 1945. [21]

[Endorsed]: No. 10877. United States Circuit Court of Appeals for the Ninth Circuit. Ringling Bros., Barnum & Bailey Combined shows, Inc., a corporation, and Al G. Barnes Amusement Company, a corporation, Appellants, vs. America Olvera, also known as America Olvera Pollinger, Appellee. Supplemental Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 9, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10877.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation,
sued as AL G. BARNES, INC., and RINGLING BROS.-
BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

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No. 10877.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation,
sued as AL G. BARNES, INC., and RINGLING BROS.-
BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This is an appeal by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company, both corporations organized and existing respectively under and by virtue of the laws of the states of Delaware and Indiana, respectively citizens and residents of those states, from a judgment in favor of America Olvera Pollinger, an alien, in the sum of \$50,000.00 general damages and costs rendered upon a verdict after trial by jury.

The amended complaint alleges that defendants were engaged in the business of operating a circus and kindred attractions to the public at large, and that defendants

were identical in ownership, management and control; that on September 24, 1936, plaintiff and defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. entered into the written contract particularly appearing in said complaint, and that on February 20, 1937, defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. ordered and directed plaintiff to render services thereunder to defendant Al G. Barnes Amusement Company; that on or about March 20, 1937, and pursuant to the terms thereof and the orders and directions of defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., plaintiff did render services as a balanced trapeze artist; that during the rendition of said services pursuant to the terms of said contract, defendants did provide, maintain and furnish the maintenance, setup and erection of the equipment and apparatus used by plaintiff in the performance of her act as a trapeze artist, and did so on September 12, 1937, at Anthony, Kansas; that at Anthony, Kansas, on said September 12, 1937, defendants, their servants, agents and employees, did grossly negligently and carelessly erect, maintain and set up the said equipment and apparatus so that as a direct and proximate result of said gross negligence and carelessness of defendants, and each of them, plaintiff, while rendering her services as such trapeze artist, did fall from said trapeze and was seriously and severely injured, and thus damaged in the sum of \$51,000.00. [Pr. Tr. pp. 2-12.]

At the time of the second trial, the amended complaint was amended again by interlineation by the insertion of the words "grossly" and "gross" in Paragraphs VIII and IX thereof, as indicated in Pr. Tr. p. 10, line 17, to p. 11, line 5.

The answers of both defendants, appellants here, deny any negligence and/or carelessness on their part and deny that appellee has been injured or damaged in any sum or amount by reason of any act, omission, carelessness or negligence of appellants, or either of them. Defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., denies plaintiff was in its employ at the time of the accident. The answers of both defendants set up the separate corporate entity of each defendant and the separate management and different officers and directors of the two circus corporations, and further show the stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. to be held in a voting trust comprised of named individuals, while the stock of Al G. Barnes Amusement Company was owned by Circus City Zoological Gardens, Inc., an Indiana corporation. [Pr. Tr. pp. 16-40.] An amendment filed at the time of the second trial set up the defense of the statute of limitations as to gross negligence.

The answers of both defendants set up numerous affirmative defenses, including briefly, assumption of risk, negligence, if any, by fellow workmen, contributory negligence, fellow servant rule, contractual duty on the part of plaintiff to maintain and take care of her paraphernalia and equipment, that the fall and injury were the result of unavoidable accident, and that plaintiff contracted away liability for negligence.

The action was originally commenced in the Superior Court of the State of California, in and for the County of Los Angeles. Defendant Al G. Barnes Amusement Company appeared therein, filed a petition for removal, and the matter was thereafter duly and as by law provided for good cause removed to the United States District

Court for the Southern District of California, Central Division, pursuant to 28 U. S. C. A., section 71. After removal to the U. S. District Court, defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., was served with the amended complaint and appeared in the action. The statutory provision believed to sustain the jurisdiction of the District Court is 28 U. S. C. A., section 71. The statutory provision giving this Honorable Court jurisdiction on appeal to review a judgment of the District Court, is 28 U. S. C. A., section 225, paragraph (a).

The pleadings necessary to show the existence of jurisdiction are the amended complaint [Pr. Tr. p. 2], the answer of defendant Al G. Barnes Amusement Company [Pr. Tr. p. 18], the amendment to the answer of Al G. Barnes Amusement Company [Pr. Tr. p. 42], and the answer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. [Pr. Tr. p. 30.]

A judgment was first entered in the trial court for a verdict of \$10,000.00 on January 30, 1940. A timely appeal was taken and this Honorable Court reversed the judgment of the trial court on May 2, 1941.

Ringling Bros. etc. v. Olvera, 119 Fed. (2d) 584.

Thereafter the case was retried before a jury and a judgment in the sum of \$50,000.00 was entered on the verdict of the jury on January 15, 1944. [Pr. Tr. pp. 85-86.] Timely motions for new trial and for judgment *non obstante veredicto* were made by both defendants and

appellants and all said motions were denied respectively on March 7, 1944, and June 30, 1944. [Pr. Tr. pp. 116-117.] Timely notice of appeal was filed August 14, 1944, by each defendant. [Pr. Tr. pp. 133-134.] Bond on appeal in the sum of \$62,500.00 covering both judgment and costs was filed by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. on August 3, 1944. [Pr. Tr. pp. 121-132.] A cost bond on appeal in the sum of \$250.00 was filed by Al G. Barnes Amusement Company on August 3, 1944. [Pr. Tr. pp. 135-137.] The record on appeal was filed with the clerk of the above entitled court and the action docketed on September 22, 1944, which was within the time allowable from the date of notice of appeal, as required by Rule 73, Rules of Civil Procedure for the District Court of the United States. The record was prepared pursuant to a designation of documents, record and proceedings to be included in record on appeal, including reporter's transcript, in accordance with Rule 75 of said Rules of Civil Procedure. This designation was filed August 30, 1944. [Pr. Tr. pp. 140-143.] A statement of the points upon which appellants intend to rely on the appeal herein, pursuant to Rule 19, subdivision 6 of the rules of this Honorable Court, was filed with the clerk September 22, 1944. [Pr. Tr. pp. 726-756.] The transcript of record was filed herein on the 22nd day of September, 1944, and by virtue of the foregoing proceedings taken within the time and as provided by the Federal Code, 28 U. S. C. A., section 230, this case is now before this Honorable Court.

Statement of the Case.

Plaintiff in this action, a woman, was an experienced professional circus trapeze artist, who had engaged in that profession from the time she was 5 years of age until the time of the accident involved in this litigation—a period approximating 25 years. She was an accomplished, proficient, and top-notch professional in the line of trapeze aerial work and knew the ins and outs of the business from start to finish. She performed for leading circuses throughout South and Central America, Europe and the United States. The apparatus itself, used by plaintiff, was fully described by her at the time of trial and was offered in evidence and is before the court as Exhibit 4. [Pr. Tr. p. 153, line 13, to p. 157, line 4.]

In 1935, in the fall, she came to the Ringling Bros. show and secured a contract with them for the 1936 season, in substantially the same language as the contract set forth in the complaint in this matter. [Pr. Tr. pp. 3-9.] She finished the season of 1936 with Ringling Bros. and in the fall of that year made a new contract with Ringling Bros. for the season of 1937, as set forth in the amended complaint in this matter. [Pr. Tr. pp. 3-9.] It was stipulated and the court entered its order approving said stipulation that said contract was made and executed in Florida. [Pr. Tr. p. 41.] When the spring circus season opened, about March, 1937, Ringling Bros. had no place for her on their show and she was referred by Pat Valdo to the Al G. Barnes show. [Pr. Tr. p. 152, line 23, to p. 153, line 12.] The evidence shows that Pat Valdo was the talent scout for the Ringling Bros. show. [Pr. Tr. p. 397, line 19.] There was no testimony adduced at the trial in regard to ownership of Ringling

Bros.-Barnum & Bailey Combined Shows, Inc., and Al G. Barnes Amusement Company. Answers of both corporations denied they were identical in ownership, management and control. [Pr. Tr. pp. 16-18.] Miss Olvera, about the time of the accident involved in this lawsuit, was able to earn in excess of \$500.00 per month by reason of her skill as a trapeze artist.

Most of the time she was performing for Ringling Bros., Miss Olvera had no net, but when she came to the Barnes show she requested of Cronin, manager of the Barnes show, a net in conformity with certain description she gave. Such a net was provided and used by Blackie Williamson of the Barnes show [Pr. Tr. pp. 163-164], in conformity with Miss Olvera's instruction. This net was used for the entire season, from March to September, 1937, up to and including the very day of Miss Olvera's fall, and its dimensions were exactly as ordered by Miss Olvera. The net furnished was satisfactory to Miss Olvera. [Pr. Tr. p. 201, lines 24-25.] It was held where she directed it to be held. [Pr. Tr. p. 202, lines 2-6.] Its center was directly under appellee's trapeze when the same was stationary because that covered the largest possible area of risk of fall. The net was handled in a manner beyond criticism during the entire season and on all prior occasions, except that on the day of the fall alone they failed to catch her in it. [Pr. Tr. p. 204, line 22, to p. 205, line 14.] The net men did nothing different on the occasion of the fall than they had been doing all the season. [Pr. Tr. p. 208, line 23, to p. 209, line 12.]

On the 12th of September, 1937, Miss Olvera came in to the tent immediately preceding her act, took her customary look at the lower or trapeze bar, found it to be

exactly level and in position. [Pr. Tr. p. 221, lines 1-5.] She was accompanied by her husband, Karl Pollinger, who came in with her and went to a place near where the trapeze hung, where he took hold of a hoisting rope and assisted her in her act. [Pr. Tr. pp. 182, 196, 197, 255.] The testimony of a number of witnesses shows that both she and her husband examined the apparatus carefully before she went into the air to perform her act. [Howard Mentz, Pr. Tr. p. 514, line 22, to p. 515, line 8; Blackie Williamson, p. 466, line 15, to p. 467, line 11; Chandler Miller, p. 588, lines 21-31.]

The evidence shows that a net approximating 10x10 feet, with looped ropes for handles, was held by from 8 to 10 men directly under the point where Miss Olvera's trapeze was when hanging normally or naturally. [Pr. Tr. p. 168, lines 9-21, and p. 169, lines 1-27; p. 202, line 1, to p. 205, line 14.] The evidence also shows that the men holding the net and erecting the apparatus for Miss Olvera were experienced circus hands, who had long been in the circus business; that they had been with the Barnes circus for the entire circus season of 1937, and that America Olvera and her husband, Karl Pollinger, both knew all of them and knew their ability, and in fact had paid them tips in recognition of their performance and ability prior to the time of the accident. [Pr. Tr. p. 210, lines 12-24; p. 165, line 13, to p. 166, line 12.]

Miss Olvera, after finding the lower bar of the trapeze level and in order, mounted the trapeze and commenced the performance of her act, which comprised a series of balancing feats, including standing balanced on the cross bar of the trapeze while swinging the trapeze backward and forward in an arc approximating 8 feet in length, and

sideways in an arc approximately 8 feet in length. In addition to this she performed a feat of balance whereby she twisted the falls or side lines of the trapeze which ran down from the upper crane bar about 12 feet above over her shoulders by a spiral motion—in other words, she spun the trapeze around so it wound up the fall lines above her head until they came down to her shoulders and then unspun the same while balancing standing on the bar. [Pr. Tr. p. 212, line 9, to p. 214, line 26; p. 227, lines 1-21; pp. 173-175.]

Having completed these items of her act and some others, she swung forward with the assistance of her husband, who pulled the cord extending to the ground, which gave her impetus for the initial swing. [Pr. Tr. pp. 195-196.] Having swung backward and forward several times, she suddenly fell from the trapeze to the ground, about 22 feet below. She missed the net by about a foot to three feet. She was severely injured in the fall and brought this action to recover damages for her injuries. [Pr. Tr. p. 271, lines 22-23, and p. 156, lines 7-11.]

Her claims respecting alleged negligence upon which she recovered a verdict in this action were two in number: (1) That there had been gross negligence in the erection of the trapeze, and (2) that there had been gross negligence in the operation and maintaining of the net held under her, in that the men didn't move to catch her as she fell. Only the first of these claims was alleged in the amended complaint.

The specific claim respecting the negligence in the erection of the trapeze is confused. The plaintiff testifies to two separate stories on this subject, which are (1) that a certain figure eight hook, a portion of the apparatus

in evidence as Plaintiff's Exhibit 2 in this matter, and the clevis hook on the crane bar, had either become tangled up when the trapeze was first erected in the tent, or (2) became so tangled up during the course of her performance, and when she made her last forward swing her trapeze snapped down from 5 to 6 inches [Pr. Tr. p. 226, lines 16-19], threw her out of balance, and tossed her out of the front of the trapeze as she was about to stand up to make the final gesture in her act. [Pr. Tr. p. 225, line 22, to p. 227, line 21, as to first interpretation; Pr. Tr. p. 175, lines 18-31, as to second interpretation.] Which of these two claims was true we, of course, have no way of knowing. She herself later said she didn't know. [Pr. Tr. p. 215, lines 9-12.]

The testimony shows that the trapeze swung backwards and forwards normally and without swinging from side to side or pulling over, one side being ahead of the other at no time during the several minutes preceding her fall that she performed other phases of the act. [Pr. Tr. p. 222, line 1, to p. 227, line 21.] Miss Olvera, though at various times during her testimony claiming that the figure eight hook remained tangled up during all the portion of her act performed, including the spinning of the fall lines, the winding up of the same, and the swinging of the same forwards and sideways prior to the last of her act, admitted that she did not know exactly when the figure eight hook became overlapped [Pr. Tr. p. 215, lines 9-12], unless it was when she looked up and actually saw it overlapping just before it came loose. [Pr. Tr. p. 175, lines, 19-31.]

The second claim of gross negligence offered and accepted over appellants' objection and not pleaded in her

amended complaint, is that the men who held the net did not move or try to move or catch her after she fell. She was 22 feet in the air when she fell and she fell about 1 to 3 feet beyond the net. Plaintiff now claims that it was negligence on the part of both defendant circuses that the men holding the net did not run over and catch her as she was falling through the air. The net used was the identical net she herself had prescribed [Pr. Tr. p. 201, lines 16-31], and the testimony showed it was dead center underneath the trapeze at the time of the accident, as directed by her. [Pr. Tr. p. 202, lines 2-6; p. 204, line 22, to p. 205, line 14.]

Miss Olvera was performing for the Barnes circus at the time of her fall. She had been sent to the Barnes circus by Pat Valdo by virtue of the correspondence and under the contract she had with Ringling Bros.

The Barnes show was a separate corporation, with separate directors and officers, and it had a separate manager. Ringling Bros. had its own individual directors, officers and managers. [Pr. Tr. pp. 17-18.] The two shows were not in any way combined but were separate circuses and shows and each a complete entity itself. The Barnes show paid Miss Olvera's salary, directed her actions and acts, and had complete and full supervision over her through Mr. Cronin, its manager. The Ringling Bros. show in no way controlled, directed, paid salaries of or had any control over the employees and individuals representing and working for the Barnes circus. [Pr. Tr. p. 399.]

The plaintiff charges that both defendants were grossly negligent and careless in the erection, maintenance and setting up of her equipment on September 12, 1937; that

as a direct and proximate result of said negligence and carelessness she fell from her trapeze on said day and was severely injured. This claim is denied by both appellants, and it is charged by both appellants that the appellee was guilty of contributory negligence and assumed the risk and hazards of her occupation in using the trapeze and equipment referred to; that the fall was an unavoidable accident; that she had contracted away her right to sue for negligence if there was any existent, and that she was required to maintain, erect and set up her own equipment safely.

In the appeal resultant from the first trial in this case, this Honorable Court reversed the judgment, the trial court having refused to instruct on gross negligence. The second trial, from which this appeal is taken, resulted in extended inquiry on the subject of both claims of gross negligence above indicated, to the end that there could be nothing left to inference. The testimony along this line is contained in Pr. Tr. pp. 201 to 205 and pp. 208 to 210, as to the subject of the net, and as to the subject of the erection of the trapeze, pp. 216 to 227, inclusive, adopting alone for the purpose of the foregoing statement the testimony of plaintiff herself.

Although the amended complaint had no allegation concerning gross negligence in it, over objection and in the face of an amendment to the answer setting up the statute of limitations, amendments by interlineation were allowed. [Pr. Tr. p. 372.] There was no evidence of gross negligence or from which gross negligence could be inferred at the time of the trial. Although the trial court indulged in some colloquy on the subject [Pr. Tr. p. 219]

and informed the jury to the contrary, and although plaintiff repeatedly testified that Pollinger did not assist in the erection of the trapeze, other witnesses did testify that he participated in the erection of the trapeze. [Howard Mentz, Pr. Tr. pp. 511-512; Chandler Miller, Pr. Tr. p. 588, line 20, to 591, line 17; Robert Thornton, Pr. Tr. pp. 437-439; George Williamson, Pr. Tr. pp. 556-560, and Philip Labay, Pr. Tr. p. 466.] And the plaintiff herself twice referred to this fact. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20.]

Appellants were not lawfully informed in the amended pleading or otherwise until the actual trial was on, that any claim was made respecting the negligent use and operation of a net designed, according to the claim of appellee, to catch the appellee when and if she fell from her trapeze. The negligence charged in the amended complaint was negligence in the erection, maintenance and setting up of her equipment. Her equipment, according to the evidence and plaintiff's own testimony, did not include a net, and therefore there was no charge in the pleadings that appellants negligently maintained or operated a net. Evidence concerning the net was introduced over the repeated objection of appellants. [Pr. Tr. pp. 163, 169.] Erroneous instructions were also given involving the subject of the net [Pr. Tr. pp. 56-60, incl.], over objections by appellants.

A variance between the pleading and proof occurred when, without any pleading to that effect and in the teeth

of an allegation that the plaintiff was performing in conformity with the identical terms of a certain written contract specifically set forth in the complaint at the time of the accident [Pr. Tr. pp. 3 to 9], evidence was admitted and instructions given to the effect that there was a modification of the contract to the extent that a net was provided and used without requiring the supervision and direction called for under the contract on the part of plaintiff. In this particular the effect of the court's instruction 14-a, read by the court to the jury and a copy thereof provided counsel for the defendants only after the jury had gone out [Pr. Tr. pp. 719-720] was particularly damaging. Besides being an erroneous expression of the law and a formula instruction not containing all defenses alleged, this instruction reopened the entire case on the subject of modification of the contract and in effect brought about a trial of the issues on ordinary negligence in the handling of the net. That instruction made the net construed as an item which was not subject to the limitation of liability clause in the contract. That the jury so took it, it is very apparent. The giving of that instruction in the manner in which it was given, deprived defendants of an opportunity to reoffer instructions theretofore withdrawn on the subject of master and servant [Pr. Tr. pp. 105 to 110], and likewise entitled the defendants to the giving of several instructions on master and servant that remained in the record, notably defendants' Instructions Nos. 10, 21, 29. [Pr. Tr. pp. 67-68-71-72-77.]

The court also denied the appellants' motions for nonsuit, for directed verdict, for judgment *non obstante veredicto*, and for a new trial, though this point was raised at the time said motions were presented.

The pleadings and the evidence, and the ruling of the court, established the fact that the appellee was an independent contractor. [Pr. Tr. p. 153, lines 9-12.] Under her contract [Pr. Tr. pp. 3-9] she assumed the risks and hazards of her employment and her act as a trapeze artist in general and thus the consequences resultant in this case. In this matter the court refused to give certain instructions [Pr. Tr. pp. 62, 65, 66, 70, 72] instructing the jury on this subject, denied appellants' motions for nonsuit, directed verdict, judgment *non obstante veredicto*, and for new trial, in all of which motions appellants raised this point.

In this case there was a duty imposed by contract upon appellee to inspect and supervise the erection of her apparatus, in the discharge of which she admittedly failed. The testimony of plaintiff disclosed that on the day in question she failed to inspect her apparatus. She owed this duty under the terms of her contract set forth in the amended complaint in this action, and failed to exercise that duty. [Pr. Tr. p. 212, lines 9-22.] The court erred in giving instructions to the jury pertaining to the subject of this duty and in refusing to give other instructions requested upon this subject. [Pr. Tr. pp. 56-58, 61-68, 70-72, 77, 79, 80.]

Specifications of Error Relied Upon.

I.

The District Court erred:

(a) In denying appellant Al G. Barnes Amusement Company's motion to dismiss the amended complaint.

(b) In denying appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.'s motion to dismiss the amended complaint.

(c) In overruling appellants' objections to the introduction of evidence.

(d) In overruling appellants' motions for nonsuit.

(e) In denying appellants' requests for directed verdict.

(f) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*.

(g) In denying appellants' motions for a new trial.

On the grounds that the appellee's amended complaint does not state facts sufficient to constitute a cause of action against these appellants in this: That said amended complaint sets forth a contract between appellee and appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., which contains a clause releasing said appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., from any liability for damages which might occur to appellee in carrying out the provisions of the contract and providing that the relationship between the parties was that of independent contractor; that the terms of the contract and the relationship of the parties relieved appellants of any liability whatsoever; that the verdict impaired the obligation of contract, thus violating the constitutional rights of appellants.

II.

The District Court erred:

- (a) In denying appellants' motions for nonsuit.
- (b) In denying appellants' requests for directed verdict.
- (c) In failing to give appellants' Instructions Nos. 9-a, 32 and 33, reading respectively as follows:

"The elemental idea of 'negligence' is failure or omission — the failure or omission to do something which should have been done. Negligence that is 'gross' involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness." [Appellants' Instruction 9-a.]

"Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case." [Appellants' Instruction 32.]

" 'Wilful and wanton misconduct' is such conduct as amounts to an intentional wrong or of such a

reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.” [Appellants’ Instruction 33.]

(d) In denying appellants’ motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*.

On the grounds that there was neither adequate allegation in appellee’s amended complaint nor adequate proof adduced at the trial to support the verdict charging the appellants with gross or any other negligence and for the further reason that the purported amendment to the complaint inserting certain language which occurred while the case was on trial, was improper and any claim for gross negligence was barred by the statute of limitations, being the provisions of Part 2, Title 2, Chapter #3 of the California C. C. P., and in particular section 340 thereof.

III.

The District Court erred:

- (a) In denying appellants’ motions for nonsuit.
- (b) In denying appellants’ motions for directed verdict.
- (c) In refusing to give appellants’ requested instructions on the subject of gross negligence or wilful misconduct, being appellants’ instructions Nos. 9-a, 32 and 33.

(d) In giving of its own motion under the caption of plaintiff's instruction 14-a, the instruction which in effect instructed the jury to find for the appellee and against the appellants if, for any cause whatsoever, the appellants failed to catch the appellee in the net, and which said instruction, being a formula instruction, failed to include all of the affirmative defenses set up in appellants' answers, notably the defenses of fellow servant, assumption of risk, unavoidable accident, failure to inspect, and neglect of her own duties under contract.

(e) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*.

(f) In denying appellants' motions for a new trial.

On the grounds that under the contract by which appellee was employed, appellee waived any action for damages on account of ordinary negligence of appellants. By giving instruction No. 14-a the court in effect abrogated the terms and conditions of the contract and by admitting evidence that a net was used as a part of the apparatus and that it was under the supervision and control of appellants, it abrogated the terms of the contract, made a modification thereof, and upon such modification allowed and directed a verdict in the event of ordinary negligence, or in fact in the event of the mere failure for any cause to catch appellee in the net. Further, in giving said formula instruction the court failed to include all the defenses affirmatively pleaded in appellants' answers as they applied to any possible claim of negligence of appellants.

IV.

The District Court erred:

- (a) In overruling appellants' motions for nonsuit.
- (b) In refusing to give the following instructions:

Defendants' instructions Nos. 8, 20 and 21, reading as follows:

"You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants." [Defendants' Instruction 8.]

"If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants." [Defendants' Instruction 20.]

"If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the em-

ployer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

(c) In denying both appellants' requests for a directed verdict.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*.

(e) In denying appellants' motions for a new trial.

On the grounds that appellee under her contract and as an independent contractor, assumed the risks and hazards of her employment and her act as a trapeze artist in general.

V.

The District Court erred:

(a) In allowing evidence to be given over appellants' objections as to the construction and operation of the net.

(b) In instructing the jury concerning the operation of a net as follows:

“If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff’s trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant’s employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the main-

tenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows." [Plaintiff's Instruction 14-a.]

(c) In refusing to give defendants' proposed instruction No. 5, reading as follows:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was in the knowledge of defendants and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants." [Defendants' Instruction 5.]

(d) In denying appellants' motions for a new trial.

On the grounds that appellee charges no negligence in her amended complaint in relation to a net, and no net is mentioned in the contract of employment, whereas the court allowed evidence over appellants' objection concerning the construction and operation of a net; that in opening up this field by allowing the evidence and instructing as the Court instructed in Instruction 14-a, the jury was

directed to find in favor of the appellee even though no gross negligence was shown in so far as the operation of the net was concerned, on account of the fact that the modification of the contract by the court resultant, relieved the appellee of her contracts against liability as to even ordinary negligence on the part of appellants, without any pleadings of modification.

VI.

The District Court erred:

(a) In refusing to give the following instructions requested by appellants on the subject of master and servant:

“The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented.” [Defendants’ Instruction 10.]

“If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an

unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

"You are hereby instructed that the plaintiff America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees." [Defendants' Instruction 29.]

(b) In prohibiting appellants from an opportunity to examine instruction 14-a before the same was read and before the jury was sent out to deliberate, in that manner prohibiting appellants an opportunity of re-offering certain instructions on the subject of master and servant in addition to those set forth in (a) *supra*, under the facts and circumstances as set forth in the affidavit of Lee Combs in support of the motion for a new trial herein, said instructions being attached as exhibit to said motion for new trial.

(c) In refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus, being

in particular appellants' proposed instructions Nos. 3, 4, 6, 8, 20 and 21:

"I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendant but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants." [Defendants' Instruction 3.]

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants." [Defendants' Instruction 4.]

"If you find that the plaintiff, America Olvera, contracted by written contract to furnish a 'specialty act' in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees." [Defendants' Instruction 6.]

“You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants.” [Defendants’ Instruction 8.]

“If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants.” [Defendants’ Instruction 20.]

“If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master’s service while he is conducting his business in a way which the servant knows

is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

On the grounds that the Court instructed the jury that the appellee was an independent contractor and appellants independent contractees, and that the contract imposed a duty upon said appellee to inspect and supervise the erection of her apparatus, in which she admittedly failed, and on the further ground that the law as applied by the Court through instruction 14-a and the admission of evidence concerning the net, abrogated the independent contractor theory and in effect directed the jury to bring in a verdict for appellee on a finding of ordinary or no negligence at all, under a formula instruction.

VII.

The District Court erred:

- (a) In denying appellants' motion for directed verdict.
- (b) In overruling appellants' motion for nonsuit.
- (c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*.
- (d) In denying appellants' motions for a new trial.
- (e) In refusing to give the following instruction:
"The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair

and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence and the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant.” [Defendants’ Instruction 19.]

(f) In permitting counsel for the appellee to make the following statements to the jury during his argument in relation to the depositions shown to have been taken in a legal matter, and concerning the appellants’ conduct toward appellee:

“That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as was the case in this matter, of the plaintiff being represented by counsel.” [Rep. Tr., p. 593, lines 9-13.]

“It is obviously an out and out violation of their oaths.” [Rep. Tr., p. 595, lines 1-2.]

“Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olvera.” [Rep. Tr., p. 595, lines 3-9.]

“This is a printed contract that was given to her by Ringling Bros. Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it.” [Rep. Tr., p. 595, lines 22-25.]

“It’s furnished to them; it’s given to them, and they are told to put their signature to it, and that’s that.” [Rep. Tr., p. 596, lines 11-12.]

“They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net? Was it to catch her in safety—Yes. Now, was that done in this case? No.” [Rep. Tr. p. 596, lines 19-24.]

“We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That’s why I think you got the truth from this man.” [Rep. Tr. p. 598, lines 5-10.]

“Here is a lady that has given the best part of her life to the rendition of her services for this company. * * * You give the best that’s in you. You give your life, or your services, and what do you get in the end? Probably just an empty life.” [Rep.. Tr., p. 598, line 22, to p. 599, line 4.]

“Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn’t.” [Rep. Tr., p. 600, lines 1-4.]

“Gentlemen, you have probably reached the conclusion that there was a previous trial in this case, and there was. It’s in the record. And there is another trial now; and don’t you think we don’t have to do everything in our power, our legal power, to convince this circus here that they ought to take care

of people who have rendered their services to them, and have given of their life." [Rep. Tr., p. 600, lines 18-24.]

"Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client." [Rep. Tr. p. 601, lines 23-24.]

"He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it." [Rep. Tr., p. 628, lines 18-26.]

"And counsel very dramatically says: Take it or leave it, because if you don't, and the contract is in some other form, whereby we assume some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words." [Rep. Tr., p. 628, lines 26, to p. 629, line 5.]

"Do you know why they put 'independent contractor' in that agreement, that printed contract? Counsel knows, and I know. He says there is no relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there wouldn't be any lawsuit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would

have been paid. This vicious contract, that was printed and delivered to her, it says 'Independent Contractor Agreement.' Independent for Ringling Bros. Circus. And that's the reason why they put that on there." [Rep. Tr., p. 629, lines 6-19.]

"If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed a wee bit dramatic because of it, it has come from the sincerity of her soul." [Rep. Tr., p. 634, line 23, to p. 635, line 2.]

On the grounds that the remarks above quoted and other remarks, the failure to give the instructions, and the conduct of the trial court, resulted in a bias and prejudice against appellants and an unfair trial to them, so gross that it could never be repaired by any direction or instruction of the court.

VIII.

The District Court erred:

(a) In denying appellants' motions to set aside the verdict for appellee and to enter a judgment in favor of appellants and for judgment *non obstante veredicto*.

(b) In denying appellants' motion for a new trial.

On the grounds that the damages in this case are excessive in that the evidence fails to show any measure of appellee's earning power or how long she might have continued as a trapeze artist, and fails to show the extent of the injury as sufficient to support said verdict, and fails to show that appellee suffered any permanent disability for any other reason than her own refusal to submit

to proper and adequate and recognized medical treatment at the time she first suffered her injury.

IX.

The District Court erred:

- (a) In denying appellants' motions for nonsuit.
- (b) In denying appellants' motions for directed verdict.
- (c) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto*.
- (d) In denying appellants' motions for a new trial.

On the grounds that there is no evidence in the entire record supporting the claim or from which it might be inferred that any gross negligence occurred in this case, either in the operation, management, erection or use of the trapeze or of the net involved in this case, and that the facts in this case do not support the verdict.

X.

The District Court erred:

- (a) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto*.
- (b) In denying appellants' motions for a new trial.

On the grounds that the court during the course of the trial made remarks prejudicial to appellants in the presence of and to the jury which affected and influenced the jury and created an attitude of bias and prejudice against appellants. Some of said remarks comprise the following:

"She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean

an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?" [Rep. Tr., p. 16, lines 14-19.]

"This is a very important phase of the case." [Rep. Tr., p. 17, line 9.]

"You don't mean that a gift was made of the net?" [Rep. Tr., p. 23, lines 18-19.]

"Maybe she does not understand the word 'establish'." [Rep. Tr. p. 30, lines 14-15.]

"I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language." [Rep. Tr., p. 32, lines 20-22.]

"However, this seems to be preliminary." [Rep. Tr., p. 37, line 20.]

"I think she has explained very thoroughly what constitutes her act." [Rep. Tr., p. 38, lines 23-24.]

"She said the net was too heavy." [Rep. Tr. p. 63, line 17.]

"The Court: In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you." [Rep. Tr., p. 71, lines 2-5.]

"The Court: I don't believe it would be a foot from the front of the net.

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isn't important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, Your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus: What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is.

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Combs: Will you measure from my wrist out to where these fingers? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body." [Rep. Tr., p. 71, line 25, to p. 73, line 12.]

"You are referring to your right shoulder." [Rep. Tr., p. 74, line 18.]

"You changed around to your left shoulder." [Rep. Tr., p. 74, line 21.]

"You don't know whether it was the right shoulder?" [Rep. Tr., p. 74, lines 24-25.]

"You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it." [Rep. Tr., p. 98, lines 9-12.]

"Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up." [Rep. Tr., p. 128, lines 14-17.]

"He has already said he heard a metallic noise; something striking metal." [Rep. Tr., p. 134, line 26, to p. 135, line 1.]

"I don't think you need answer that question. It is a rule of physics." [Rep. Tr., p. 146, lines 13-14.]

"The Court: Don't argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court." [Rep. Tr., p. 147, lines 17-21.]

"Don't answer that. The court will limit the cross-examination on that point. [Rep. Tr. p. 149, lines 17-18.]

"No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately." [Rep. Tr., p. 153, lines 22-24.]

"Mr. Comb, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions." [Rep. Tr., p. 272, lines 14-16.]

"I don't think it is material. The motion will be denied." [Rep. Tr., p. 333, lines 17-18.]

"The Court: It has been stipulated that it is correct.

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, Your Honor.

Mr. Marcus: It is a part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I don't think the question is proper, Your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when it had reached a certain position he held up his hand, and told them it was correct. That is my recollection of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, Your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in

mind the admonition of the court and return when called by the bailiff.” [Rep. Tr. p. 347, line 20, to p. 349, line 10.]

“Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion.” [Rep. Tr., p. 500, lines 10-12.]

“Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty.” [Rep. Tr., p. 500, lines 18-21.]

“No, Mr. Combs, that is what he is attempting to explain.” [Rep. Tr., p. 514, lines 26, to p. 515, line 1.]

“He means, have you placed it on the diagram? Was there anything else except that flying act you have referred to, above her rigging, or within the distance between the two center poles?” [Rep. Tr., p. 520, lines 10-13.]

“Do the best you can, Mr. Miller.” [Rep. Tr., p. 521, line 13.]

“He said he did not remember, Mr. Marcus.” [Rep. Tr., p. 527, line 2.]

“There is no use asking him the question again. He just said he did not remember it.” [Rep. Tr., p. 527, lines 4-5.]

“It is not necessary to rebut it under such circumstances.” [Rep. Tr., p. 575, lines 24-25.]

XI.

The District Court erred:

(a) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto*.

(b) In denying appellants' motion for a new trial.

(c) In admitting answers to questions concerning conversation in an attempted impeachment of Chandler Miller.

On the grounds that the Court allowed extended inquiry of witness Chandler Miller concerning an alleged conversation with appellee in which over objection, appellee's counsel recited a purported and erroneous summary of said conversation [Rep. Tr., p. 560, line 2, to p. 562, line 23], reiterated same with appellee [Rep. Tr., p. 571, line 20, to p. 575, line 25], which was followed by the comment by the Court: "It is not necessary to rebut it under such circumstances." Through the statements of counsel over objection, and the comments of the Court, the witness was improperly discredited before the jury.

The District Court erred:

(a) In refusing the motion to strike in the following matter:

"Q. But is it during all of the performances of the other acts before you? A. No, sir, because

some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I don't have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I don't have nothing to do with it," as a conclusion of the witness.

The Court: Denied." [Rep. Tr., p. 39, lines 17-26.]

(b) In refusing to permit answers to the following questions:

"Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Don't answer that. The court will limit the cross-examination on that point." [Rep. Tr. p. 149, lines 15-18.]

"Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

The Court: I don't think you need answer that question. It is a rule of physics." [Rep. Tr., p. 146, lines 11-14.]

"Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Alvera, would that indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts; assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain parts of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and, therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied." [Rep. Tr., p. 216, line 25, to p. 217, line 26.]

SUMMARY OF ARGUMENT.

1.

There is no evidence of gross negligence or of wilful misconduct sufficient to support the verdict in this case.

2.

The so-called plaintiff's instruction 14-a given by the Court, was erroneous in that it was a formula instruction omitting defenses pleaded and abrogating contractual rights of the parties, and was incoherent and unintelligible.

3.

The contractees (defendants) under the circumstances violated no duty owed plaintiff in regard to either premises or appliances, and consequently could not have been guilty of negligence of any kind.

4.

Where there is a contractual assumption of risk, any defects in apparatus should have been observed by plaintiff under her contractual duty to inspect, and lack of inspection should relieve defendants from responsibility.

5.

Contributory negligence was established as a matter of law in this case.

6.

The verdict deprives the defendants of the protection afforded by the Constitution of the United States.

7.

In comments and rulings of the Court and counsel in the presence of the jury, a bias and prejudice was created against defendants which resulted in an excessive verdict.

ARGUMENT.

POINT I.

There Is No Evidence of Gross Negligence or of Wilful Misconduct Sufficient to Support the Verdict in This Case.

It has already been determined by your Honorable Court in a previous appeal of this case (*Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a Corporation, Appellant, vs. America Olvera, etc., Appellees*, 119 Fed. (2d) 584) that only upon a showing of gross negligence proximately causing her injuries could the appellee America Olvera recover against the appellants. This decision was made under the terms of a contract existing between the appellee America Olvera and appellants.

This point having already been decided, we shall spend no further time on it in this brief. It is our contention, however, that in the trial of this cause there was no evidence whatever which would support a charge of gross negligence upon the part of appellants or their employees.

(a) REVIEW OF LAW ON GROSS NEGLIGENCE AND WILFUL MISCONDUCT.

The law on gross negligence and what is sufficient to constitute the same we can briefly review as follows:

Gross negligence has been defined and distinguished from "wilful misconduct" and "ordinary negligence" a great number of times by the courts of California. We submit the definition given in *Krause v. Rarity*, 293 Pac. 62, 210 Cal. 644, 77 A.L.R. 1327 (from which case one

of the defendants' requested instruction herein was taken). It reads as follows:

"In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

Krause v. Rarity, 293 Pac. 62, 210 Cal. 644 at 655;

See also:

Walker v. Bacon, 23 Pac. (2d) 520 (Cal.);

Olson v. Gay, 27 Pac. (2d) (Cal.) 922.

The court in *Cal. & Hawaiian Sugar Refining Co. v. Harris County Huston Ship Channel Navigation Dist.*, 27 Fed. (2d) 392, in answering plaintiff's contention that there is no distinction between gross negligence and ordinary negligence, said:

"With plaintiff's effort in this regard, I do not agree for I think there inheres in the term 'gross negligence' as expanded and applied by the courts in the past, a clear and certain meaning and that the distinction sought to be made between gross and simple negligence is in itself a distinction grounded upon public policy. (Citing 4 A.L.R. 1186.) I am, therefore, of the opinion that the doctrine laid down in *Interstate C. Co. v. Agnew* (C.C.A.), 255 Fed. 508, is a correct statement of the law and if the defendant has made a contract with the plaintiffs against the results of its negligence, that this must

be held valid and the proof in this case failing to establish more than negligence, the defendant would have to be held exonerated."

Cal. & Hawaiian Sugar etc. Co. v. Harris County etc. Dist., 27 Fed. (2d) 392.

The lack of pleading gross negligence or facts which would constitute gross negligence, was urged upon the District Court by defendants on their motion to dismiss the amended complaint, as not stating a legal claim upon which relief could be granted. That this was a fatal defect under the laws of California (forum), we submit the following authorities:

"It has been stated that a complaint which avers that a defendant wrongfully and negligently did a certain act, does not state a cause of action for gross negligence."

19 *Cal. Jur.* 676, Sec. 100, Point 11.

The authority cited for this statement is

Michalitschke Bros. v. Wells, Fargo & Co., 50 Pac. 847, 118 Cal. 683,

And the court held that

"A complaint averring merely that the defendant 'wrongfully and negligently failed to deliver' certain packages committed to it as a common carrier, does not show that the loss occurred through 'gross negligence' within the meaning of section 2175 of the Civil Code."

Michalitschke Bros. v. Wells, Fargo & Co., 50 Pac. 847, 118 Cal. 683.

This case now constitutes the said law on pleading gross negligence in California.

The case of *Nichols v. Smith*, 28 Pac. (2d) 693, 136 Cal. App. 272, is authority not only on this point of pleading but also on the necessity of instructing the jury as to gross negligence. The language used by the court is as follows:

“Respondent could not recover against appellant unless appellant was guilty of gross negligence, which is something more than ordinary negligence. How then can it be said that it was sufficient to charge only ordinary negligence? If this were the rule it would lead to endless confusion. A complaint alleging that the plaintiff was a guest and charging the defendant with ordinary negligence would then be sufficient, yet the plaintiff would be required to go beyond the allegations of the complaint in the proof. Furthermore, findings that all the allegations of such complaint were true would be insufficient to sustain a judgment under the guest statute, but the findings would have to go beyond the pleadings and embrace a finding of gross negligence. In the event of a trial by jury, it would be necessary for the court to instruct the jury that no verdict could be returned in favor of plaintiff upon proof of ordinary negligence as alleged in the complaint, but that such verdict could only be returned in the event that the jury found that the defendant was guilty of gross negligence.

“In support of her position that the usual allegations of negligence constituted a sufficient averment of gross negligence, respondent relies upon the *dictum* found in the opinion of this court in *Malone v. Clemow*, 111 Cal. App. 13 (295 Pac. 70). The language referred to was unnecessary to the decision as may be seen from a reading of the opinion. The complaint in that case alleged that the defendant

'drove, operated and controlled said automobile in a grossly negligent manner' and the specific acts relied upon were set forth. Respondent also cites *Castro v. Singh*, 131 Cal. App. 106 (21 Pac. (2d) 169). The portion of the opinion relied upon was based solely on the *dictum* in *Malone v. Clemow*, *supra*, but there again we do not believe that the language referred to was necessary to the decision. The complaint in that case, in addition to alleging that the specific act was 'negligently' done, alleged that it was 'wantonly' done. We believe that in so far as the language of said opinion indicates that the mere allegation that a defendant 'negligently drove' an automobile is a sufficient allegation of gross negligence under the guest statute, such language should not be followed."

Nichols v. Smith, 28 Pac. (2d) 693, 136 Cal. App. 272, at 276-277;

Nichols v. Smith, *supra*, has been followed in *Lombera v. Union Paving Co.*, 38 Pac. (2d) 871, 3 Cal. App. (2d) 268;

Bartlett v. Jackson, 56 Pac. (2d) 1298, 13 Cal. App. (2d) 435.

The foregoing authorities have all been before the court and the court had the benefit of them in the decision of the first trial in this matter. Subsequent to that date however, the case of *Donnelly v. So. Pac. Co.*, 18 Cal. (2d) 863, was decided, which clarified the law on the subject of gross negligence and the subject of wanton and reckless misconduct is distinguished from negligence. We are happy to have this decision available inasmuch as it amplifies by court decision the extent to which the release from liability goes in this case. The gross negligence from which such a release would not be effective

would have to be of the wanton and reckless misconduct type instead of the mere epithet type referred to in the *Donnelly* case. This is in substance the same rule as exists at common law. The basis of the invalidity of a release from negligence, is that it violates public policy, and a man cannot contract against his wrongful act, but the type of wrongful act referred to in those cases where public policy is infringed upon, is of a wanton and reckless type or an intentional and wilful type. The federal rule follows the wanton and reckless definition.

“Some jurisdictions, including California, distinguish between ordinary and gross negligence. (*Kastel v. Stieber*, 215 Cal. 37 (8 Pac. (2d) 474); *Albers v. Shell Co. of Calif.*, 104 Cal. App. 733 (286 Pac. 752); *Walther v. Southern Pacific Co.*, 159 Cal. 769 (116 Pac. 51, 37 L.R.A. (N.S.) 235); see 6 So. Cal. L. Rev. 91, 127.) This distinction amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations. (See *Walther v. Southern Pacific Co.*, *supra*.) The federal rule, however, clearly recognizes the validity of a release from liability for negligence, including what in California would constitute gross negligence, and holds such a release inapplicable only in the case of wanton and reckless misconduct as distinguished from negligence.

“In the present case the alleged conduct of the switchman does not constitute wanton and reckless misconduct. There is no allegation that he intended to throw the switch the wrong way. Apparently, he did not know he was throwing the switch the wrong

way and that harm would probably result. He was guilty of negligence alone. This negligence may have been 'gross' under the California rule, but the federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct. 'It would be going a great way to say that the failure of the switch tender to throw the switch so that the train would go on the main line was a wanton and malicious neglect. The only thing that can be said is that some one was careless, and that is admitted.' (*Shelton v. Canadian Northern Ry. Co.*, 189 Fed. 153, 160; see *Milwaukee & St. Paul Ry. Co. v. Arms*, supra.) There is therefore no basis for a finding of reckless and wanton misconduct."

Donnelly v. Southern Pacific Co., 118 Pac. (2d) 465; 18 Cal. (2d) 863, at 871, 872.

Even a casual scrutiny of the evidence in the instant case conclusively establishes the total absence of the wanton, wilful, or intentional factor, and even if the plaintiff proves what is known as the epithet type of gross negligence (which she by no means did), our release clause would still be effective as to that.

This rule is set forth in a number of decisions of the federal courts and we refer in particular to the case of *Westre v. Chicago, Milwaukee & St. Paul Ry. Co.*, 2 Fed. (2d) 227, in which a release clause similar to that in the case at bar was contained in a lease between the railroad company and the plaintiff. Under this clause the railroad company was relieved of any liability for its negligence. The court upheld the validity of this clause, stated that there would be no liability for either ordinary or gross negligence and held that the only thing for which the

railroad company would be liable would be its wilful and wanton misconduct.

The facts in this case were much stronger than those in the case at bar in that there was evidence of knowledge of conditions on the part of the defendant railroad company which might lead to a conclusion of conduct amounting to something more than negligence, but the court still held that there was no evidence of any conduct upon the part of the railroad company which would be of sufficient strength to take the case out of the negligence release clause.

We most earnestly assert, therefore, that under the rule announced in the two last cited cases there would be no liability whatever in the case at bar upon the part of the appellants except upon a showing of some act or omission amounting to wilful misconduct on their part.

In conformity with the foregoing law on the subject of gross negligence, appellants submit their instructions Nos. 9-a, 32 and 33 which were refused by the court. The instructions referred to are as follows:

“The elemental idea of ‘negligence’ is failure or omission—the failure or omission to do something which should have been done. Negligence that is ‘gross’ involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness.” (Appellants’ Instruction 9-a.)

“Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case.” (Appellants’ Instruction 32.)

“‘Wilful and wanton misconduct’ is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons.” (Appellants’ Instruction 33.)

That the foregoing are proper definitions of the law of gross negligence and should have been given appears from *Donnelly v. Southern Pac. Co.*, 118 Pac. (2d) 465, 18 Cal. (2d) 863; *Russell v. Cleveland*,.....N. E....., 169 Ill. App. 149; *Seelig v. First Nat’l Bank*, (District Court, Ill.) 20 Fed. Supp. 61, 68.

In the light of the foregoing, the court should have given said instructions, and failing to do so should have granted a directed verdict, or failing that should have granted appellants’ motion for judgment *non obstante veredicto* and the motion for a new trial.

(b) REVIEW OF THE FACTS SHOWING THERE WAS NO
EVIDENCE TO SUPPORT THE VERDICT

There is no evidence whatsoever in the record in this case to establish gross negligence required to entitle the plaintiff to a recovery. Miss Olvera alone claims to have seen and to know what happened at the instant she fell—and this notwithstanding she was performing her act at the time. All her testimony on that subject appears in the following pages of the printed transcript: [Pr. Tr. pp. 175 to 233]. There was nothing broken on the trapeze. [Pltf. Ex. 2, Pr. Tr. p. 469, lines 21-28; p. 593.]

Philip LeBay is the only witness who looked at the crane bar prior to Miss Olvera's fall. He testified that the figure eight hook was placed before the act and not tangled up. He was the only person, Miss Olvera included, who looked at the crane bar prior to Miss Olvera's commencing the actual performance of her act, and his testimony on this subject is uncontradicted and he said at that time the figure eight hook and the crane bar hook were in place. [Pr. Tr. p. 467, line 1, to p. 469, line 31.]

The contention of the plaintiff in this case is that the defendants were guilty of *gross* negligence in the maintenance of two items of equipment: (1) the erection of the apparatus upon which Olvera performed, and (2) the management and operation of the net in which she should have fallen. In dealing with the testimony on these matters we will primarily direct the Court's attention solely to the testimony of Miss Olvera, for on that there could have been no conflict resolved by the jury, and we must therefore take that testimony as the best possible case she could have offered.

She herself was confused as to what took place. First she said that she saw the figure eight hook actually in the process of overlapping when she looked up at the instant of the peak of her swing just before her fall. [Pr. Tr. pp. 175, lines 19-31.] Later she said that she did not know when the hook overlapped. [Pr. Tr. p. 215, lines 9-12.] Still later she attempted to leave the inference, although she did not know that fact, that the eight hook had become tangled up when the trapeze was erected. [Pr. Tr. pp. 226-227.] Only the showmanship and glamour that enabled her to hold the attention of more than 10,000 persons at a performance in the big top enabled her to get by with such inconsistency. She was very clear on the fact that the lower trapeze bar swung evenly when she swung forward and back on it and did not swing further out to one side than to the other when she swung sideways on it. If the figure eight hook was overlapped as she stated, from 5 to 6 inches, shortening of the fall line would occur and this would raise the lower trapeze bar. She testified it was level, however, and that she saw it was level when she came into the ring, and indeed she could not have performed at all if it had been in the slightest off level. [Pr. Tr. p. 221, line 23, to p. 222, line 10.]

In any event, if the figure eight hook was tangled up, the fall line on that side would be shorter than the fall **line on the other** and it is a matter of mathematical or physical calculation that when she swung forward and back the side with the longer line would swing out slightly ahead of the other side. The reason for this is that the arc or portion of circle described by a certain radius will be longer than that described by a shorter radius, and over a swing of eight or more feet forward and back

and eight or more feet sideways, this discrepancy would become very apparent, especially to a trained performer. She testified that there was no variance in the swings. [Pr. Tr. p. 222, line 1; p. 224, line 31.] She testified that she would have noticed it had there been even so much as one inch. [Pr. Tr. p. 224, lines 6-10.] This leads us to an inescapable conclusion that the hook was not overlapped and to the obvious absolute impossibility of her story concerning that matter.

Carrying her testimony a little further we observe that on cross-examination when pressed by counsel to explain what had compensated for the difference in the length of the two fall lines in order to make the lower trapeze bar level, she attempted to explain away the situation by finding the hook holding the clevis on the crane bar likewise out of place, and at that time she cupped her hand to indicate that the clevis was actually hooked up on the upper portion of the hook rather than in the socket thereof; [Pr. Tr. p. 225, line 22; p. 226, line 3] that just at the instant of the fall it slipped down and at the same time the eight hook slipped down. She made two obvious conclusive errors in this statement: (1) to have placed the clevis higher in the crane bar hook would have only accentuated and made still shorter the already shortened fall line on that side, and (2) for that to have occurred on the same side as the tangled up eight hook would likewise contribute to the same result. She could not place this tangled condition on the other side of the trapeze because of the absolutely fantastic nature of the claim that she could look at both those places, so far apart from each other, at the same instant. That group of facts, coupled together, make impossible as a physical fact the

story respecting the tangled condition of the eight hook. She admitted the erection of the equipment in the same manner as it had been erected on previous occasions and the eight hook had never become tangled [Pr. Tr. p. 216, lines 24-31], and numerous other witnesses so testified. [Pr. Tr. p. 442, lines 22-31.]

In order to shift the responsibility at common law, and in this case under the contract relating to inspection, she claimed that neither she nor her husband, whose negligent act as a member of the community would have been imputed to her, participated in the erection of the trapeze, inferring that they were prohibited by the exigencies of time in the performance of her act from so doing. The testimony of all other witnesses other than she and her husband, was contrary to this [Pr. Tr. p. 514, line 22, to p. 515, line 8; p. 466, line 15, and p. 467, line 11; p. 588, lines 21-26], and in fact it was actually admitted that he participated to the extent of pulling her up and certain other phases of her act. [Pr. Tr. pp. 196, 197, 182, 255.] The testimony of all other witnesses was to the effect that Pollinger did participate in the inspection and erection of the trapeze, and on one occasion Miss Olvera herself when offguard and questioned by a juror, and on another occasion by her own counsel, let the cat out of the bag as it were and did admit the husband's participation. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20.] If she did not inspect the apparatus it was her duty to do so and she failed in that regard and should not be permitted to recover. If Pollinger participated in the erection of the apparatus, he was a party to any negligence, if any there was, and that was imputed to Miss Olvera.

The condition of the eight hook as claimed by Miss Olvera, is rendered all the more fantastic by what had transpired prior to that in the performance of her act. Prior to the fall, she had done two out of three of her exercises [Pr. Tr. p. 172] involving many details, related in her account hereinbefore referred to and among which were ten or twelve crossettes, numerous swings backwards and forward on an arc of about 14 feet, side-wise on an arc of about 8 feet, and a whirl or windup and unwind of the side line or ropes supporting the trapeze. At the end of all this, and almost at the end of her act, she looked up, saw the eight hook and the clevis hook on the crane bar disarranged, which at that instant snapped down, causing one side of her trapeze to be lower by three and one-half inches than the other. She lost her balance and fell from the trapeze. The cross-examination conclusively establishes this to be impossible. [Pr. Tr. pp. 213-227.]

Coming to the second claim of gross negligence, we find the following condition prevailing: She was using a net in the exact form, style and size designated by her [Pr. Tr. pp. 163-163, 2101, lines 16-31], operated in identically the place and in the manner directed by her [Pr. Tr. p. 202, lines 2-6; p. 204, line 22; p. 205, line 14], which had all been so used for the entire circus season lasting from March until September, before that criticism or objection by her and exactly as she expected and wanted it to be done. [Pr. Tr. p. 204, line 22; p. 205, line 14; p. 208, line 23; p. 209, line 12.]

So far then, there could be no negligence of any kind or character on the part of defendants. The only claim of negligence in relation to the net that she makes, is

that these eight or ten men did not move in unison the necessary distance after she began her fall, or after she began to fall, to catch her in the net. She was 22 feet above the ground in her swing. [Pr. Tr. p. 156, lines 7-11; p. 271, lines 22-23.] The net was held by the men with a thong running around the wrist and their hands clenched together, their elbows at their sides. [Pr. Tr. p. 169, lines 20-30.] This would mean that the net was approximately 3 feet off the ground and would reduce the distance from her body as she stood there in the air, to the net, to about 19 feet. It is a well known fact of physics that a falling body falls 16 feet the first second and 32 feet the second second. Miss Olvera states she fell about one foot outside the net. This would mean that these 8 or 10 men would have apparently 1.2 seconds in which to appreciate or understand what was happening and move in unison a distance of at least one foot and probably as much as 3 feet, in order to catch her in the net.

“As the court said in *Goodson vs. Schwandt*, 300 S. W. 796, quoting from *Rollison vs. Railway*, 160 S. W. 994: ‘To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence on such pulsebeats and hair-splitting, such airy nothings of surmise.’”

Hamilton v. Finch (Ore.) 109 Pac. (2d) 852.

“Simple calculations based upon these data (speed and feet) indicate that the defendant had at the most not over two seconds in which to act after he became aware of the danger. The New Hampshire cases establish that in such a short interval of time there is opportunity only for instinctive action, and that such action, without proof of unfitness to act in

an emergency, does not provide a basis for a finding of negligence.”

Whicher v. Phinney, 124 Fed. (2d) 929.

This was the first time such a thing had occurred and they were exactly in the place where they had been directed to be.

Especially having in mind the fact that different individuals react differently when presented by sudden peril or a sudden exigency, recognized in law as the sudden peril rule, can it conceivably be claimed that these two defendant circuses were guilty of *gross* negligence for the failure of these men to catch her in that net, under those circumstances. We do not believe many, if any individuals, could have accomplished that feat in so short a period of time with rehearsal, much less without it. We are convinced that it would not be humanly possible for 8 or 10 men so to act. Even if it were, they would not be guilty of gross negligence in failing so to act.

Are these defendants to be held liable—plastered with the label of gross negligence amounting to wilful misconduct, for an accident of this sort? And where they had never done a thing wrong in the management of the apparatus in more than six months of daily performances for the whole season before? And where nothing has been left for such a surmise, inference or speculation? [Pr. Tr. pp. 201-209, 216-227.]

(c) THE PLAINTIFF'S CLAIM IS TOO IMPROBABLE TO BE WORTHY OF ANY CONSIDERATION AND IS CONTRADICTED BY THE PHYSICAL FACTS.

The only evidence concerning the trapeze before the actual accident took place was that it hung normally and that there was nothing outside of the ordinary respecting

the manner in which it hung or was erected. [Pr. Tr. p. 467, line 1, to p. 469, line 31; pp. 402, 403, 437, 515, 536, 538, 593.]

The plaintiff made much of an inference attempted by the fact that as she fell the one side of the trapeze was lower or hung down lower than the other side. The testimony on this subject was that this appeared shortly after the accident. Nowhere does it appear that it was lower at the exact instant that Olvera fell. [Pr. Tr. pp. 297, 312, 441, 469, 470.] Lysaught testified that he dropped the rigging immediately. [Pr. Tr. pp. 367, line 27 to 368, line 5.] Cronin and Valdo testified that it was level immediately after the plaintiff fell. [Pr. Tr. pp. 480, 293, 402, line 23, and 403, line 3] and such was likewise the testimony of other witnesses. What no doubt occurred was exactly what occurs whenever an accident takes place in the circus, or in fact whenever an act is over;—the workmen rush to their places and remove the equipment immediately and in doing so one crew might let their side down a little before the other side had slacked off their ropes. Consequently, one side of the trapeze did hang down slightly after the accident. In the light of Olvera's testimony that she went through her entire act without anything out of the ordinary appearing or happening regarding the trapeze [Pr. Tr. pp. 226-227], and that she looked up and saw the hook overlapping at the instant she fell [Pr. Tr. p. 175, lines 19-31], this fact is conclusively confirmed and makes her claim so improbable and in fact impossible, as not to be worthy of consideration or support. That the appellate court may reverse a case upon facts so inherently improbable or amounting to a mere scintilla of evidence, as

not to have been worthy of serious consideration, is well settled.

Herbert v. Lankershim Estate, 71 Pac. (2d) 229;
9 Cal. (2d) 409.

"It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence."

Galloway v. U. S., 130 Fed. (2d) 467;

Brady v. So. R., 64 Sup. Ct. Rep. 234.

So far, we have scrupulously taken testimony and evidence from the plaintiff's story alone in deference to the rule of resolving disputes of fact in favor of the appellee. The impossibility of this fall being the result of negligence on the part of the appellants has been established by a review of that evidence, but we still search our minds for the question of what actually did happen as the final clincher on such a thought. It is common knowledge, and the evidence abundantly shows, that Olvera and other trapeze artists frequently fall both in practice and in performance. Olvera herself did so and was amply protected by nets or other safety devices against the hazard of such fall, especially when she was practicing. Her business was admittedly and contractually a hazardous one. Such falls occur where there are no defects in the apparatus, and what actually happened in this case was that the plaintiff, when making a "style" at the end of one of her giant swings, over-did it slightly in emphasizing her performance to Pat Valdo, the talent scout for Ringling Brothers, and fell out of the front of her trapeze.

POINT II.

The So-Called Plaintiff's Instruction 14-A Given by the Court, Was Erroneous in That It Was a Formula Instruction Omitting Defenses Pleaded and Abrogating Contractual Rights of the Parties, and Was Incoherent and Unintelligible.

The Court of its own motion redrew plaintiff's Instruction No. 14 and then gave it as plaintiff's Instruction No. 14-a, reading as follows:

"If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the

event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows." [Pr. Tr. p. 703, line 5, to p. 704, line 13.]

The privilege of examining this redraft was not afforded to the defendants until long after the jury had retired to the jury room. [Pr. Tr. pp. 719-720.] Their first hearing of this instruction occurred when the court read it to the jury. We have no quarrel with the right of a court to instruct a jury in conformity with the law, but in this case such conduct prohibited the defendants from

their right to present counter instructions or to alter their theory of the case and from their rights to present timely and proper objections. This instruction is erroneous in several respects and constituted prejudicial error.

(1) It is divided into two sections, the first, approximately one-half thereof, dealing with the subject of the apparatus and the second one-half thereof dealing with the subject of the net. In the first one-half thereof the use of the word "or" in line 6 thereof [Pr. Tr. p. 56], makes it in the alternative instead of the conjunctive and thus eliminates other pleaded defenses. In other words, this is equivalent to instructing the jury that if the injury were not the result of an unavoidable accident, and if the defendants constructed the trapeze in a grossly negligent manner which proximately resulted in the accident, the plaintiff could recover. It being a formula instruction, this violates the law requiring the full statement of all phases of defense in a formula instruction.

Mazotta v. L. A. Ry. Co., (Cal. 1944), Pac.
(2d), 25 A. C. 163;

Bee v. Tungsten Corp., 151 Pac. (2d) 53, 65
A. C. A. 1009.

(2) The second section of this instruction violates all of the law of this case inasmuch as it directs a verdict in the event of the failure of defendants to catch plaintiff in safety when she fell. This is not the duty of defendants in this case. The duty is to refrain from gross negligence. As a matter of fact, we contend and have heretofore argued, that the type of gross negligence in-

volved is what amounts to wilful misconduct under the California rule. It is our contention and belief that gross negligence as defined under the California statute—the epithet type of gross negligence—is itself eliminated by the contract of the parties in this case.

Donnelley v. So. Pac., 118 Pac. (2d) 465; 18 Cal. (2d) 863.

The giving of the instruction referred to in effect directed a verdict for the plaintiff no matter what negligence or lack of negligence was proven in the event the jury found alone the fact that defendants failed to catch the plaintiff in safety.

(3) This instruction had the additional vice of reopening the case on ordinary negligence. Heretofore, on representations and statements that the case was to be tried on the theory of gross negligence and on the theory of independent contractor, defendants withdrew certain instructions on the fellow servant rule. [Pr. Tr. pp. 105-110.] This instruction in effect directed that there was a modification of the contract pulling the net phase out of the exemption clause in the contract against negligence. This reopened the case on ordinary negligence in violation of the law of this very case and that effect was achieved through the giving of instruction 14-a. This was particularly vicious so far as defendants and appellants were concerned when we consider that the court gave that instruction to the jury as it was about to retire and that no copy thereof was provided counsel for defendants until after the jury had retired, thus

no opportunity was afforded to reoffer master and servant instructions. Fortunately for the state of the record, defendants as an excess of caution, had left three master and servant instructions in the record, being Instructions 10, 21 and 33. [Pr. Tr. pp. 67-68, 70-71, and 77.]

In the light of the interpretation the Court placed upon this trial by his Instruction 14-a, the Court erred in refusing those instructions.

There was abundant evidence that the injury in this case was the result of negligence, if any, of a fellow servant. [Pr. Tr. pp. 511-512, p. 588, line 20; p. 591, line 17; pp. 437-439; 556-560; 466, 200-227.] Pollinger himself was a participant in the erection of the trapeze and there was evidence on this subject from the plaintiff's own lips. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20] and abundantly from the testimony of other unbiased witnesses—fellow servants. In fact, the whole affair was the result of actions of fellow servants if the master and servant doctrine was permitted to be applied. If the use of this net and its operation by show employees was a modification of the contract of the parties hereto, it brought into play (1) the fellow servant rule and (2) contributory negligence as a matter of law by the plaintiff and her husband, in either (a) their failure to inspect and direct the erection and maintenance of equipment [Pr. Tr. p. 221; 212, lines 9-27; 160, lines 12-14] or, (b) their negligence in doing so. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20; 511-512; 588, line 20; 591, line 17; 437-439; 550-560; 466.]

POINT III.

INDEPENDENT CONTRACTOR.

Where the Relation of Independent Contractor and Contractee Exists Between the Parties, the Duty Owed by Contractee to the Contractor Is No Greater Than That Owed by an Invitor to an Invitee in Regard to Premises, and Where It Is the Duty of the Contractor to Furnish, Maintain and Inspect the Appliances Used, the Contractee Owes No Duty to the Contractor in Relation to Appliances Other Than to Refrain From Wilful Injury.

We agreed to this state of facts [Pr. Tr. p. 153, lines 9-12], although it precluded defendants from using other defenses recognized by the law of Kansas (*locus delicti*), relating to master and servant or employer and employee, such as the "fellow servant" rule. While in its broad sense the contractee may be an employer, it is universally held that the relation and duties of a master to a servant or employee, or employer to employee, cannot exist between independent contractor and contractee.

Pottorff v. Fidelity Coal Mining Co., 86 Kan. 774; 122 Pac. 120;

Browning v. Allvine Dairy Co., 19 Pac. (2d) 474; 137 Kan. 209.

Many other legal relations more nearly approximate the relationship in the duties of each to the other of independent contractor and contractee, than that of master and servant. We mention invitor and invitee, landlord and tenant, bailor and bailee, charterer and shipowner, as well known examples.

However, the contractee does owe a duty to the contractor and it approximates the duty an invitor owes to an invitee as to premises, similar to the duty a landlord owes his tenant or a shipowner owes to a charterer.

In regard to the premises, the contractee owes a duty to a contractor invited to work thereon to notify the contractor or invitee of any hidden or latent dangers known or which should have been known to the contractee or invitor and not known if not obvious or could not have been ascertained by the contractor by the exercise of ordinary care and prudence. This rule is well settled in California, as follows:

“If this was a case where there existed a latent or hidden defect in the walls fraught with danger to those working or being about and near the walls, or a dangerous defect other than that which was obvious to any person of common intelligence or sense, and of which defect the defendants had knowledge but of which neither the contractors nor the deceased were aware at the time they entered upon the work of removing the junk and debris from the premises, it would undoubtedly have been the duty of the defendants to warn the contractors or the deceased of the added danger following from such latent defect, and failure on their part to do so in such case might justly subject them to liability for any damage resulting from such defect.”

Brown v. Board of Trustees, 41 Cal. App. 100 at 107, 182 Pac. 316.

“The only duty owing by the defendant to plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant’s duty to warn him of any danger in and about the premises

which he knew or in the exercise of ordinary care ought to have known, and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered.”

Gowing v. Henry Field, 281 N. W. 281; 225 Iowa 729.

While most of the cases brought by an independent contractor against his contractee in actions for negligence relate to safe or unsafe premises, or safe or unsafe place to work, it will be remembered that in the instant case no question of the safety of premises is involved. The only question here is gross negligence relating to the erection of appliances used by plaintiff and owned and controlled by plaintiff, to-wit, the trapeze, rigging or apparatus, and gross negligence in the operation of a net. The plaintiff strenuously urged at the trial that the net was a part of her apparatus or equipment. [Pr. Tr. p. 163.] This contention was made in meeting defendants' objection that no negligence concerning a net was pleaded. [Pr. Tr. pp. 163, 169.] It is submitted if the net were a part of the apparatus or equipment used by plaintiff, the net would fall within the provisions of the contract relating to plaintiff's duty to furnish and maintain the equipment. This is clear from the following provisions in the contract:

“The artist shall furnish and maintain in first class condition, at his expense, all paraphernalia and equipment. The artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The artist assumes exclusive supervision regarding inspection

of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same.”

That this portion of the covenant on the part of plaintiff to be performed was not waived in any manner by the defendant, is shown by that portion of paragraph 2 of the written agreement which is set out on page 3 of plaintiff’s amended complaint, beginning with line 25, as follows:

“It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc., are changes exclusively under control of and for the convenience of the artist, and in no particular modify or restrict the artist’s relations with the show as an independent contractor . . .”

Instructions concerning the net or appartus used, safe place to work, or safe appliances, and the duty of the master to furnish same, had no application to the facts of this case under the contract of employment heretofore referred to, for the reason that the master does not owe any duty to furnish safe appliances or safe place to work where the appliances are furnished by the servant herself.

Callan v. Bull, 113 Cal. 593 at 603; 45 Pac. 1017.

“The rule which requires the master to provide a safe place and safe appliances for the servant, is applied when the place in which the work to be done is furnished or prepared by the master, as in the case of a ship, or a mill, or a factory, or when the machine or other appliance with which the servant is

employed to work are furnished by the master; *but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself.*" (Italics ours.)

Peterson v. Beck, 27 Cal. App. 571; 150 Pac. 788, approving, citing and holding with the rule stated in *Callan v. Bull*, *supra*.

"The rule requiring the master to provide a safe place for the servant, does not apply when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself."

Albert v. McKay & Co., 174 Cal. 451 at 455; 163 Pac. 666;

Carolyn v. S. P. Ry. Co., 84 Fed. 84 at 87;

Sowles v. Norcross Bros. Co., 195 Fed. 889 at 892.

It will be again noted that these quotations contain citation of cases relating to master and servant, but we again submit if the rule of law announced in said cases applied to a servant, they would apply with even greater force to an independent contractor.

Especially would this be so where there was a contractual obligation on the part of the contractor to furnish, inspect and maintain all her appliances and equipment.

It is also submitted that no suggestion was ever made, either by pleading or proof, that the defendants had ever exercised any control over plaintiff in her work sufficient to change the contractual relationship.

Judge Cosgrave on June 26, 1939, in denying defendants' motion to dismiss, intimated that plaintiff had

pleaded, although improperly, a change in the agreement "as may amount to an executed oral agreement," and was entitled to a hearing. [Pr. Tr. p. 14.] After the hearing the trial court properly and conclusively decided this point in his instructions to the jury, as follows:

"You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, America Olvera, was performing duties assumed by her under her written contract with the defendant Ringling Brothers-Barnum & Bailey Combined Shows, Inc., *and no other*; that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of 'independent contractor' on the part of plaintiff, and 'contractee' on the part of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, Inc." (Italics ours.) [Pr. Tr. pp. 706-707.]

We submit that plaintiff was bound by the terms of her original contract, *and no other*, as an independent contractor.

We further submit and challenge the appellee to cite any recognized authority showing facts where an independent contractor recovered damages for injuries caused by unsafe premises, unless said injuries were caused by some latent defects known only to the contractee and not known and could not have been known to the contractor by the use of reasonable prudence. We further challenge appellee to cite any recognized authority holding an independent contractor could recover damages for injuries

caused by defects, latent or obvious, in appliances, apparatus or equipment where it was the contractual duty of such independent contractor to furnish and inspect such appliances.

The argument contended for in this paragraph becomes all the more cogent and impelling when we consider that the claim of gross negligence in this case is based (1) upon the maladjustment of a figure eight hook or clevis, or both, under extremely uncertain and doubtful conditions, conditions, which indicate that it probably actually became disarranged during the process of Olvera's act and through her own exertions on the trapeze, and (2) concerning the moving of a net in the matter of approximately one and one-tenth seconds by eight or ten men confronted by a situation of imminent peril. Is this Court willing to determine that either one of such claims is a peril or danger of which the defendants knew, or ought to have known beforehand, that the failure so to do was so extreme as to constitute gross rather than ordinary negligence? How could such an application of the law be reconciled with the doctrine of independent contractor? To do so to our minds would in effect obliterate the doctrine of imminent peril and establish something new and different in the law, such as a *res ipsa loquitur* of gross negligence.

The District Court also erred in refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus.

POINT IV.

ASSUMPTION OF RISK.

Where Employees of the Contractee Assisted the Independent Contractor in Arranging Her Apparatus Prior to Her Performance on Same, Any Plain and Obvious Defects in the Arrangement of the Apparatus Should Have Been Observed and Appreciated by the Independent Contractor Under Her Contractual Duty of Inspection Where Independent Contractor Could Qualify as an Expert in Such Matters, and Any Defect Such as Claimed by Plaintiff Should Have Been Observed, and the Court Erred in Refusing to Give the Defendants' Requested Instruction on This Point.

The question of "assumption of risk" as a defense in this case is controlled by the law of Kansas; Kansas being stipulated as the "*locus delicti*." [Pr. Tr. p. 2.] We believe this principle of law so well settled that we shall devote but little space thereto.

"All matters of defense to an action, such as the fellow servant rule, contributory negligence, assumption of risk, etc., are to be determined in accordance with the '*lex loci delicti*.' "

5 R.C.L. 1044, Sec. 135, Note 9.

And again this rule is stated in Restatement of the Law, subject Conflict of Laws, sections 385 and 386, as follows:

"Whether contributory negligence of the plaintiff precludes recovery in whole or in part in an action for negligent injury, is determined by the law of the place of wrong."

Restatement of the Law, Conflict of Laws, Sec. 385, p. 470.

“The law of the place of wrong determines whether a master is liable in tort to a servant for a wrong caused by a fellow servant.”

Restatement of the Law, Conflict of Laws, p. 472.

“It is the well settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed.”

Loranger v. Nadeau, 215 Cal. 362, 10 Pac. (2d) 63.

To same effect:

Poole v. Day, 40 Pac. (2d) 396, 141 Kan. 195;

Keane Wonder Mining Co. v. Cunningham, 222 Fed. 821.

Any question of implied assumption of risk in this case is obviated, due to the actual contractual assumption of risk of the plaintiff, independent contractor, in the contract. [Contract, paragraphs, 8-12, Pr. Tr. pp. 7, 8 and 9.]

The law of Kansas, “*locus delicti*” has always recognized the defense of assumption of risk in cases of negligence involving master and servant and since the adoption of a modified form of workmen’s compensation law Kansas recognizes such defenses in all cases between master and servant where the parties are not within the terms of the Act, except where injury is caused by wilful negligence of the employer.

Kansas Workmen’s Compensation Act, General Laws of Kansas, Sec. 44.505, p. 1052; Sec. 44.507, p. 1054; Sec. 44.543, p. 1069; Sec. 44.545, p. 1070.

As neither the plaintiff nor defendants in this case were entitled to come within the provisions of said Act, said Act would not apply and reference thereto is only offered to show that the defense of assumption of risk would apply as between contractor and contractee to an even greater extent than between master and servant, especially where the assumption is not implied but contractual.

It will be noted that in the contractual assumption of risk as set out in paragraphs 8 and 12 of the contract in suit, that besides the general duty of inspection and assumption generally of all risks, paragraph 12 contains the following clause:

“Artist for himself and the personnel of his troupes, accepts all risks incident to the business.”
[Pr. Tr. p. 8.]

The artist's business in this case was a trapeze performer, and it is submitted that the erection of her trapeze was an incident to performing on said trapeze and there would of necessity be risks incident to an erection of the trapeze, such as loose guy wires, kinked chains or hooks, trapeze bars uneven and unlevel, and a risk due to a failure in the operation of the net in catching the artist in the event of a fall. Direct supervision and inspection of both the trapeze apparatus and the net was also assumed by the artist-plaintiff, in the following words:

“Artist assumes exclusive supervision regarding the inspection of the act and premises, and agrees to keep the premises safe, warrants that all persons

appearing or practicing in the act are conversant with and suitably fitted for same." [Contract, par. 8, Pr. Tr. p. 7.]

It will be remembered also that the artist-plaintiff in this case was an expert, as a trapeze performer of 25 years' experience, of mature age, and one of the leading exponents of her art, and that she had similar accidents before. [Pr. Tr. pp. 147-151.] And any defect, such as an overlapped chain or hooked guy rope or wires, uneven or unlevel bars or misplaced net, would be obvious to her at a glance and yet she testified that she operated the trapeze for almost the full length of her act and only noticed an overlapped hook at the time of her fall. [Pr. Tr. p. 175, lines 18-31; p. 212, lines 19-25.]

The most charitable thing that can be said of her story is that it is "inherently improbable," but if probable, and the jury, if it did not decide the case on the net, evidently believed it was, even as an employee or servant and without a contractual agreement she would have assumed the risk impliedly under the law of Kansas. And she, being under a contractual bargain to assume such risk as an independent contractor, would be held to have assumed the risk under the law of any place not covered by special statute.

The law of Kansas as to assumption of risk by an employee may be tersely stated as follows:

Under ordinary employment contract, in absence of agreement to the contrary, servant assumes risk ordinarily or obviously incident to employment.

Hunter v. Barnsdall Ref. Co., 268 Pac. 86, 126 Kan. 277.

"The test is commonly said to be whether the facts and danger are as fully within the knowledge and appreciation of the employee as of the employer. . . . He (servant) must be deemed to appreciate the danger if it is one that is perfectly obvious to a person of his intelligence from the known facts. If through momentary forgetfulness he fails to act upon the knowledge that he has, this does not avoid the defense of assumption of risk."

Barnes v. Akins, 166 Pac. 474, 101 Kan. 359.

"Assumption of risk can be declared as a matter of law where an employee sees the danger, knows what its consequences may be and continues his work with that danger confronting him. Assumption of risk cannot be declared as a matter of law unless the employee knows or should know what the danger is and knowing that danger, continues in the performance of his labor."

Tartar v. Mo. K. & T. Co., 241 Pac. 246, 119 Kan. 738.

"Before it can be said that an employee has assumed the risks of an employment, it must be shown that he knew or had reasonable opportunity of knowing what those risks were; that is, he must not only know or have reasonable opportunity of knowing the dangerous conditions but must know or have reasonable opportunity of knowing the danger growing out of those conditions."

Fritchman v. Chetwood Battery Co., 8 Pac. (2d) 368, 134 Kan. 727.

"The general rule is that, where the servant accepts or continues in employment, knowing or hav-

ing equal means of knowledge with the master of the defects and dangers inherent in the employment, he assumes the risk of injury therefrom.”

Riverside Iron Works v. Green, 79 Kan. 588. 100 Pac. 482.

“But reduced to its last analysis, the doctrine of assumed risk must rest for its support upon the express or implied agreement of the employee that, knowing the danger to which he is exposed, he agrees to assume all responsibility for resulting injury.”

A. T. & S. F. Ry. Co. v. Bancord, 71 Pac. 253; 66 Kan. 81.

We submit that the following instructions requested by the defendants and refused by the court, were erroneously refused, and that the instructions proffered correctly state the law of Kansas on the subject of assumption of risk:

Defendant's Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants. [Pr. Tr. pp. 65-66.]

Defendant's Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risk incident thereto and can not recover from the defendants. [Pr. Tr. pp. 70-71.]

Defendant's Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect. [Pr. Tr. pp. 71-72.]

Defendant Ringling Bros-Barnum & Bailey Combined Shows, Inc., in their answer and in the sixth, separate and distinct defense, alleges as follows:

“That at the time and place of the accident sued on herein, plaintiff as an employee of the Al G. Barnes Amusement Company, was engaged in the performance of services for said Al G. Barnes Amusement Company, as employer, and that by agreement with said Al G. Barnes Amusement Company had assumed for herself exclusively all risks incident to such employment, including the risk of the accident sued on herein, and said agreement released and discharged all of the defendants in this action of any of the claims, demands, causes of actions, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services for defendant, Al G. Barnes Amusement Company, or for any other person or individual under and by virtue of the terms of the contract set forth in the amended complaint herein, or otherwise or at all.” [Pr. Tr. pp. 34-35.]

It is again submitted the court erred in denying appellants' motion for a new trial, in denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto*, on the grounds that appellee under her contract, and as an independent contractor, assumed all risks and hazards of her employment and her act as a trapeze artist in general.

POINT V.

Contributory Negligence Was Established as a Matter of Law in This Case.

Contributory negligence was established as a matter of law in this case by the failure of the plaintiff and her husband to inspect the apparatus adequately. It appears that they did so inspect, and did not do so properly, from the testimony of the plaintiff and other witnesses. If it was otherwise and they did not inspect at all, they should have done so under the contract and their failure in that regard gave rise to their contributory negligence as a matter of law.

POINT VI.

The Verdict Deprives the Defendants of the Protection Afforded by the Constitution of the United States.

In failing to apply the contractual provision relieving defendants of liability, the trial court violated Amendments V and XIV of the Constitution of the United States and deprived the defendants of property without due process of law.

POINT VII.

In Comments and Rulings of the Court in the Presence of the Jury, a Bias and Prejudice Was Created Against Defendants Which Resulted in an Excessive Verdict.

The trial court made numerous comments during the course of the trial in the presence of the jury relating to matters before the court, which gave an impression to the jury that the court was unfavorably disposed to the defendants' case and brought in issues that should not

have been before the jury, emphasizing the plaintiff's case to her advantage. These items are quoted in Paragraph X of the Statement of Points upon which appellants intend to rely on appeal, and we refer the court to them without restating them here.

Counsel made improper statements and comments to the jury in connection with depositions and in connection with the case as a whole, which were permitted by the trial court during the course of the argument, and the instruction of the court to disregard certain of these matters as appears in the record [Pr. Tr. pp. 667-669] did not alter the effect of bias and prejudice against the defendants by reason thereof. These items are stated in the points upon which appellants intend to rely on appeal, Point VIII heretofore quoted in this brief pages 32 to 33, and we will not restate them here.

The District Court erred in allowing a purported impeachment of Chandler Miller by rambling account of counsel [Pr. Tr. pp. 649-651] and in making the comment "it is not necessary to rebut it under such circumstances."

The trial court erred in refusing the motion to strike the statement "I don't have nothing to do with it," relating to the hanging of the rigging, referred to in Point XII of Statement of Points upon which appellants intend to rely on appeal. Obviously this should have been stricken as a conclusion and it was germane and material to the case and in fact one of the main issues in the case, and it was prejudicial error to deny it.

The court erred in refusing to permit answers to the questions indicated in Point XII, part "b," of Statement of Points upon which appellants intend to rely on appeal.

All of the foregoing matters served to accentuate the bias and prejudice in favor of plaintiff on the part of the court, to contribute to the showmanship so aptly effected by the plaintiff during the course of the trial, and served in effect to place the stamp of approval by the court upon a verdict which, in this case, amounted to the full amount prayed for in the complaint. This was further emphasized to appellants' prejudice by the refusal of the court to give our instruction No. 19, reading as follows:

"The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be based upon sympathy for or prejudice against any party. *Star Brewing Co. v. Houck*, 222 Ill. 348; 78 N. E. 827."

The plaintiff herself, traveling without a cast, of her own choice on a circus train, after having three vertebrae broken [Pr. Tr. p. 211, lines 1-8] certainly greatly accentuated and made permanent an otherwise very curable injury. [See Kersten's medical testimony, Pr. Tr. pp. 497-499.]

Conclusion.

In conclusion we submit that appellants are entitled to a reversal in this case, primarily and conclusively on the ground that the facts do not support the verdict of the jury and there are insufficient facts upon which the verdict could be based. This particularly appears from the lack of evidence in the record sustaining the so-called epithet rule of gross negligence. Facts sustaining the wilful misconduct type of gross negligence applicable in this case are obviously likewise totally absent. It further appears from the record that the court erred in giving the so-called plaintiff's instruction 14-a. This purported formula instruction leaves out several of the defenses pleaded by the defendants, in the first portion thereof, and in fact directs a verdict for the plaintiffs under any circumstances in the second portion thereof relating to the operation of the net, requiring that in the operation of the net the defendants catch the plaintiff in safety. The defendants under no circumstances violated any duty owed to the plaintiff in this case on account of the relationship of independent contractor and contractee between the parties, the duty regulative of their conduct by virtue of that relationship being in substance solely to refrain from knowingly causing harm to plaintiff. The contractual assumption of risk by the plaintiff and appellee in this case likewise relieves defendants and appellants of any liability as a matter of law and in this respect the evidence shows that the appellee herself was guilty of contributory negligence as a matter of law. To hold oth-

erwise would deprive defendants and appellants of their rights under the Constitution of the United States. Numerous errors and comments by both court and counsel during the trial and the argument contributed in this case (along with several rulings on evidence) to an excessive verdict based on bias and prejudice.

We respectfully submit that this case should be reversed without the right of new trial and that appellants take judgment against the appellee for their costs.

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In the
United States
Circuit Court of Appeals

In and for the Ninth Circuit

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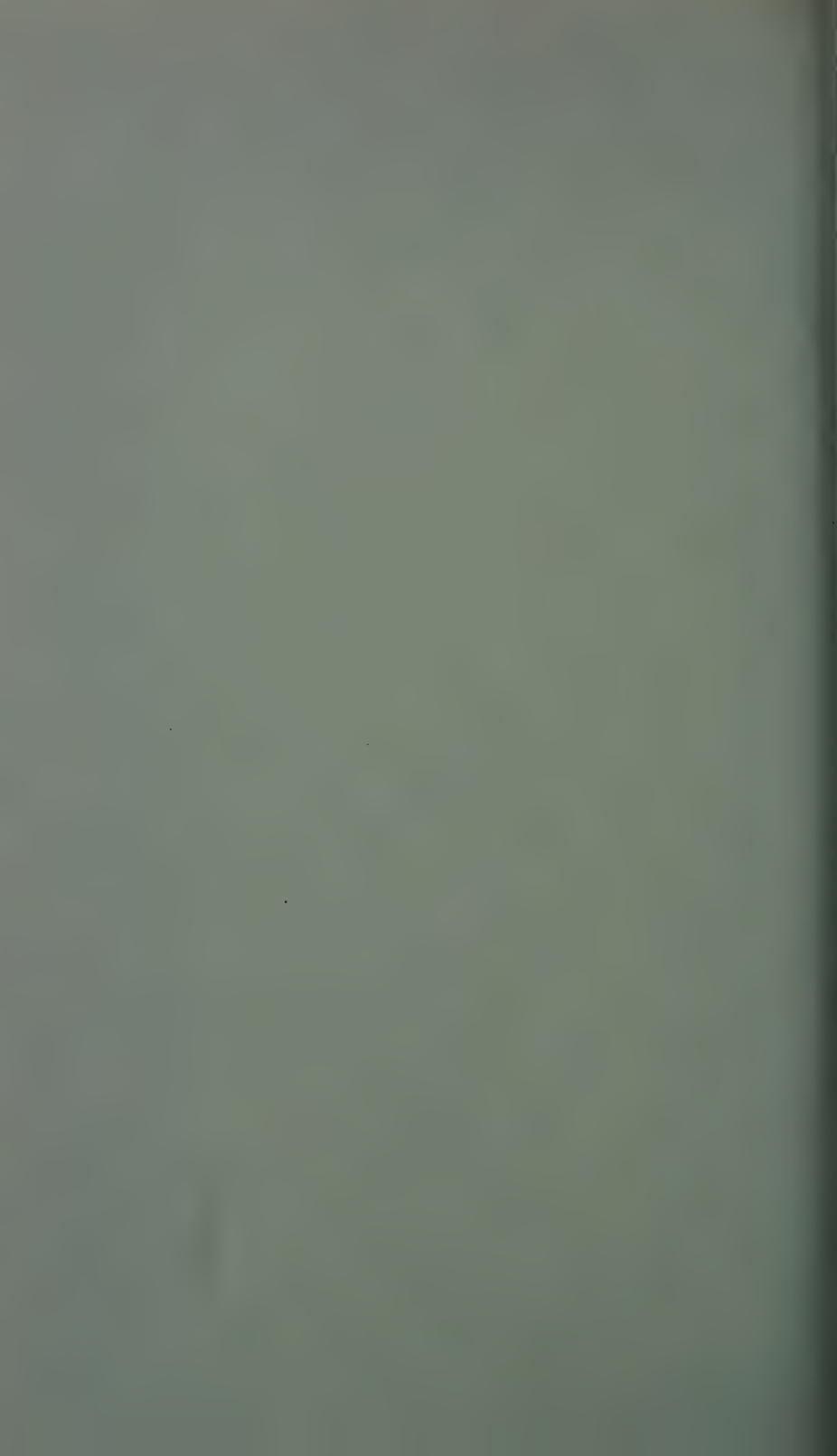
Appellee.

REPLY BRIEF FOR APPELLEE

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JAN 4 - 1946

WALL B. O'BRIEN



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In the
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AL G. BARNES AMUSEMENT COM-
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Appellants,

vs.

AMERICA OLVERA, also known as
AMERICA POLLINGER,

Appellee.

No. 10877

REPLY BRIEF FOR APPELLEE

This is an appeal by the defendants from the final judgment of the trial court, by which the plaintiff was awarded damages for personal injuries in the sum of fifty thousand dollars.

This was the second trial of the case. In the first trial judgment was rendered for the plaintiff but a reversal was ordered because of an erroneous instruction concerning the type of negligence which is es-

essential to a recovery under a clause in the contract agreement which, on its face, purports to release the contractor from all claims growing out of any injury to the artist during the performance of the contract.

Since nearly all of the issues and questions argued in Appellants' Opening Brief have been determined by this court's decision¹ in the former appeal by virtue of the doctrine of the law of the case it is important to review the scope of that decision. Questions decided are:

1. "There is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes Circus was one of 'its,' Ringling's Circuses within the meaning of the" agreement between Ringling and Olvera, "that Barnes Circus" was "under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances."

In other words, there was evidence from which liability of both defendants might be properly inferred, if the other essential elements of plaintiff's case is established.

2. That "there is evidence from which the jury properly could infer . . . that they (said injuries) were caused by either the *gross negligence* or ordinary negligence of Barnes' employees while so under Ringling's management."
3. "There was evidence from which the jury could infer that Barnes had assumed those incidents

Note¹—119 F (2d) 584. A copy is set forth in the Appendix to this brief.

of Olvera's act which consisted of furnishing and 'maintaining' parts of its equipment and 'apparatus,' namely, the trapeze . . . and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall."

4. That "there was evidence from which the jury could infer" that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby the fall was occasioned, and on the part of the net holders in failing to hold it under her."
5. That there was evidence from which the jury could infer that such negligence of the Barnes' employees caused "the injuries and damages to her for which the jury gave its verdict."
6. That "Olvera might recover though she knew the danger and peril if the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries."
7. That the provision of the contract which stipulates "that the law of Florida shall control its interpretation" and provides that such law shall control "all the liabilities and obligations of the parties with regard to the performance and execution is to be applied in this case, even though the law of the forum is different."
8. That "the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence," but does not exempt them from their "gross negligence."

9. That gross negligence was properly defined in defendants' requested instruction which read:
- “Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences.”

The foregoing propositions were decided and are the law of the case for the purposes of the second trial and this appeal because the evidence received at the two trials was substantially the same.

Appellants' Opening Brief has not questioned such sameness and it is not anticipated that it will be disputed. To point it out would unduly and unnecessarily prolong this brief. It may fairly be said that any new evidence presented in the second trial was cumulative. The same contract was produced; the same trapeze and net were involved; the same testimony was given by the same witnesses as to the same occurrence in which Olvera fell and was injured, except that the testimony of certain witnesses for both sides which was given at the first trial was read at the second trial in lieu of having such witnesses testify.²

²Below is a list of the witnesses at both trials and references to their testimony by transcript citations in each trial:

PLAINTIFFS' WITNESSES

Transcript of Record

1st Trial

No. 9594 (This Court)

	Pages
Cronin, Sylvester	337-338 inclusive
Johnson, Charles	563-569 “
LaBay, Philip	333
Lysaught, Jack	557
Miguel, Aristo	272-288 inclusive
Nelson, Bert	326-331 “
Pollinger, America Olvera.....	170-267 “
(Direct)	576
Pollinger, Karl	288-325 inclusive
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Williams, George	474-493 “

PLAINTIFF'S WITNESSES

Transcript of Record

2nd Trial

No. 10877 (This Court)

	Pages	
Johnson, Charles	349-356 inclusive	
Lysaught, Jack	362-368	"
Miguel, Aristo	310-326	"
Pollinger, America Olvera.....	146-231	"
(Rebuttal)	645	
Pollinger, Karl	253-283 inclusive	
(Rebuttal)	652	
Stewart, Steele, Dr.....	234-252 inclusive	
Tasker, Dain L., Dr.....	327-343	"
Yacopi, Joe America.....	290-302	"

DEFENDANTS' WITNESSES

Transcript of Record

2nd Trial

No. 10877 (This Court)

	Pages	
Cronin, Sylvester	475-500 inclusive	
Kersten, Hugo M., Dr.....	486-499	"
LaBay, Philip	460-474	"
Matlock, William	530-566	"
Mentz, Howard	507-529	"
Miller, Chandler P.....	577-598	"
Seals, P. W., Dr.....	381-396	"
Thornton, Robert	435-459	"
Valdo, Pat	397-424	"

To avoid unnecessary repetition and volume in this brief it may be said that generally speaking the description of the nature and history of the case, set forth in the opening brief pages 1 to 5, inclusive, is correct, although it should be added that it was stipulated during the instant trial that the parties, plaintiff and defendants, to the contract in suit were related as independent contractor and contractee. It should also be pointed out the reversal of the judgment rendered in the first trial was based upon only one ground, to-wit, error of the court in refusing to give the instruction above described, otherwise appellant's assignments of errors were disapproved.

Under the caption "Statement of the Case" is set forth a purported condensed statement of the gist of the evidence, (Op. Br., pp. 6-13), with *some interspersed argument*, followed by a preview of points later argued and appellants' theories concerning them.

It is difficult to decide whether, in the interest of brevity, it is best to provide another statement of the case as to the gist of the evidence or to correct the numerous errors in such statement in appellants' brief.

As appellants' so-called "Statement of the Case" is so interspersed with specious argument, misstatement of fact and unwarranted conclusions we controvert his statement and submit the following as the Statement of the Case.

STATEMENT OF THE CASE

Plaintiff, America Olvera, was born June 8, 1906 at Mazatlan, Sinaloa, Mexico, and she is a Mexican National citizen. (Sup. Tr. of Record, pages 785 and 800.) Her family consisted of 16 brothers and sisters, father and mother, all aerial trapeze artists. (Pr. Tr. 147.) When six years of age she commenced her instructions from her father and thereafter continued her trapeze artistry until at the time of her accident she had become known as the world's premiere balancing trapeze artiste. Plaintiff had traveled and performed as a feature attraction for circuses and made public appearances throughout Mexico, United States, Central and South America and Europe. (Pr. Tr., 147, 150, 151.) In 1933 she came to the United States, met Pat Valdo and was employed by (defendant) Ringling Bros. Circus. She was employed by and traveled with the Ringling Bros. Show from 1933 to 1936 performing the same act. On September 24, 1936, America had a conversation with Pat Valdo, personnel director of the Ringling Bros. Show. The contract, plaintiffs' Exhibit I dated September 24, 1936, and titled "Independent Contractors Agreement" between Ringling Bros.-Barnum and Bailey Combined Shows and America Olvera, was introduced in evidence. (Pr. Tr., p. 152.)

The following appears *verbatim* from the record:

"MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract

she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes' Show; that she was received there, and employed by that show under the terms of that contract.

MR. MARCUS: Not as an employee of the show.

MR. COMBS: Eliminate that phrase of the stipulation. (9) We will go that far with you. I meant to state that she worked for the Barnes Show under the terms of the contract.

THE COURT: Might it not be agreed that she was an independent contractor?

MR. COMBS: Yes.

MR. MARCUS: So stipulated, your Honor."
(Pr. Tr., p. 152, 153.)

And again:

"Q. BY MR. MARCUS: You reported to San Diego did you for the Barnes' Show?

A. Yes.

MR. MARCUS: I presume there will be no objection to the letter going in evidence.

MR. COMBS: No objection.

MR. MARCUS: We offer this letter in evidence at this time.

THE COURT: What is the purpose?

MR. MARCUS: To show that she was directed to go there your Honor.

THE COURT: I don't believe Mr. Combs is making any point on that, are you, Mr. Combs?

MR. COMBS: *She was directed to go by Valdo and reported for the opening of the Barnes Show.*

THE COURT: And she was actually perform-

ing her act under her contract at the time of the accident? (19)

MR. COMBS: *Yes.*" (Pr. Tr., p. 161.)

The answers of the defendants disclose and admit that the entire stock of the defendants Ringling Bros. and defendant Barnes Shows were contracted and held by the *same identical voting trust*. (Pr. Tr., pp. 17, 18.)

The Board of Directors and Officers of both shows were interlocking. (Pr. Tr. 17-18.)

The evidence discloses that many acts engaged under contract by the Ringling Show were directed to render their services to the Barnes Show. (Pr. Tr. 408-409-410.)

Miss Olvera while rendering her services with the defendant Ringling was provided with a safety net by the show (Pr. Tr. 163) and was furnished a safety net when performing with Barnes and men to hold the net. (Pr. Tr. 165.)

Upon arriving at San Diego to begin her performances with Barnes—Cronin, the show manager, agreed to provide her with a safety net to be used during her performance (Pr. Tr. 163) and provided the men to hold the net. (Pr. Tr. 165.) These men were employed by the Barnes Show and paid by them. (Pr. Tr. 165.)

Her personal apparatus was delivered to the show employees at San Diego and at no time thereafter had possession of it during the season. (Rep. Tr. 168-169.)

The apparatus upon which Miss Olvera performed was erected and placed in position by the rigging men employees of the circus prior to the performance of Miss Olvera's act. (Pr. Tr. 179.)

The men holding the net were to move with Miss Olvera and watch her—"keep constantly the eyes on me." (Pr. Tr. 202.)

The purpose of a movable net is to watch the performer in the air, follow her movements and move the net with her performance so that in case of a fall the men can place the net so as to break the fall and catch the artist in safety. (Pr. Tr. 168-169, 202-203.)

Miss Olvera's rigging and equipment was erected and set up and maintained by the employees of the Barnes Circus. The main ropes, blocks and hooks were attached to the poles at the top of the main tent and were erected and hoisted when the big top was set up. (Pr. Tr. 213.)

Blackie Williamson was the supervisor of the rigging and rigging men all employed and paid by the show (defendant). (Pr. Tr. 170-202.)

The circus arrived in Anthony, Kansas, on September 12, 1937. Miss Olvera's rigging during the entire itinerary from San Diego was kept in a trunk in the possession of the employees of the circus together with the other equipment of the show. When she arrived at the show grounds for her performance the main top had been set up together with the two blocks and lines of

her rigging. The ropes were suspended from the main top of the tent. The balance of the equipment consisted of the upper and lower bar, the cross bar and the two bolts in the form of stars to hold the lower bar. This equipment was hoisted into position and rigged out by the employees of the defendant show during the show and immediately prior to Miss Olvera's performance. The two bars were under the main top approximately 35 feet above the ground. (Pr. Tr. 167-168; 178-179; 215-216.)

On September 12, 1937, Miss Olvera started her performance about 4 P. M. She entered the center ring and was assisted to her trapeze by her husband. (Pr. Tr. 172-182.) She immediately commenced her act which consisted of a series of balancing feats without touching the side lines; in this part of the act she swung the trapeze sideways and in a spiral motion. (Pr. Tr. 173.) The first part of her act took about 3 minutes. (Pr. Tr. 172.) At the same time there are two other acts in performance in the two adjoining rings on each side. (Pr. Tr. 172.) Toward the end of her act she began to swing the trapeze backward and forward while seated on the bar. Her fixed point of view so far during her act was a fixed object on the ground. (Pr. Tr. 215.) She had swung out about 4 feet (Pr. Tr. 212-213) and then began to rise on the trapeze. At that instant she changes her point of view to the crane bar at the top of the tent. At that instant she noticed the hook was overlapped. (Pr. Tr. 175;

212-213; 225-225); on the right side (Pr. Tr. 215-226) and becoming disengaged the right side of the trapeze dropped about 5 or 6 inches and threw Miss Olvera out of the trapeze to the right side. (Pr. Tr. 214-215.)

She then testified:

“Q. What did you do in order to save yourself?

A. I know how to fall, and I place myself to fall in the net.

Q. How did you do that?

A. I went out this way, with my head down, because I tried to reach with my hand this line to catch me, this arm. The slack of the hook wouldn't let me catch the line, and I went this way. So, knowing there was a net, I make myself in a group and I catch my knees and my hands, like that, the way we learned to fall into the net, and tried to pull myself like for a somersault, and not hit with my head in the net. I hit with my back in the ground; not in the net.” (Pr. Tr. 176.)

She was in continuous performance from the time she entered the ring until her act was concluded. (Pr. Tr. 178.)

She then testified:

“Q. Do you know of your own knowledge whether or not this net moved at any time?

A. No, sir, it was not moved at all. I struck one of the men on the shoulder when I came down.” (Pr. Tr. 180.)

On cross-examination Miss Olvera testified:

“Q. Will you please explain exactly what the men handling the net did when you made the swing backward and forward on your trapeze?

A. What they did?

Q. Yes.

A. They didn't do nothing.

Q. They stayed right where they were?

A. Right where they were.

Q. They never moved their feet?

A. No, sir.” (Pr. Tr. 204.)

And again:

“Q. In fact, isn't it true that if they had moved the net underneath you, during each performance, it would have diverted your attention, and have been an annoying thing to you in the course of your performance, wouldn't it?

A. No, sir.

Q. Isn't it true that trapeze performers object to movement going on around underneath their trapeze during the performance?

A. I don't know what other trapeze performers do. I never did.

Q. How far from the outer end of the net did you fall?

A. Scarcely a foot out, sir.

Q. When you fell, I understand you struck the back of one of the men holding the net?

A. Yes, I did.”

Mr. Pollinger testified:

He did not assist his wife in the performance of her act (Pr. Tr. 254) but simply helped pull her up on the trapeze to begin her act. (Pr. Tr. 255.)

“Q. Had you on any occasion taken any part in holding the net?

A. No, sir.

Q. Who were these men who did?

A. The net men from the show.

Q. Did you pay them?

A. No, I did not.

Q. Do you know who paid them for their services?

A. Yes.

Q. Who did?

A. The show paid them.

Q. What did these men do besides hold the net, to your knowledge?

A. I wouldn't know just what kind of work they did.” (Pr. Tr. 258.)

When the trapeze threw her out he heard a metallic noise—like something broke. (Pr. Tr. 259.) That came from the trapeze. (Pr. Tr. 261.)

He observed the lower bar when he came in with his wife and it was perfectly level. He saw the lower bar of the trapeze after his wife fell and one side of the trapeze was 5 or 6 inches lower than the other. (Pr. Tr. 265.)

“Q. Did the men holding the net *move* at any time before your wife fell from the trapeze, until she struck the ground?

A. No, sir, most of them did not even observe she fell down.

Q. Answer the question: Did they move at any time from the moment your wife fell from the trapeze until she struck the ground?

A. No, they didn't.

Q. Did you move?

A. Yes, I did.

Q. What did you do?

A. I ran to catch my wife.”

Miss Olvera was seriously injured and rendered a hopeless cripple for life, and to this date cannot even walk without the aid of crutches.

Ordinarily we would overlook the misstatements of fact in appellant's statement of the case and attribute them to overzealousness but when they go beyond the bounds of propriety and misquote the record we must comment on their authenticity.

On page 11 of his brief appellants say “the two shows were not in any way combined but were separate circuses and shows and each a complete entity itself.—The Ringling Bros Show in no way controlled, directed, paid salaries of or had any control over the employees and individuals representing and working for the Barnes Circus.”

An examination of the answers will disclose the

interlocking directorate (Pr. Tr. 17-18) and admission that the entire stock of both defendants were owned, controlled and held by the same identical voting trust (Pr. Tr., 17-18), and the finding by this court on the former appeal, that—

“Appellants admit that the stock control of both circuses was in a common trust, though each has an independent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes’ Circus was one of ‘its,’ Ringling’s Circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes’ performances; and that they were caused by either the gross negligence or the ordinary negligence of Barnes’ employees while so under Ringling’s management.”

Olvera vs. Barnes. 119 Fed. 2nd 584.

And further the record discloses the following:

“MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes’ Show; that she was received there, and employed by that show under the terms of that contract.

MR. MARCUS: Not as an employee of the show.

MR. COMBS: Eliminate that phrase of the stipulation. We will go that far with you. I meant

to state that she worked for the Barnes Show under the terms of the contract.

THE COURT: Might it not be agreed that she was an independent contractor?

MR. COMBS: Yes.

MR. MARCUS: So stipulated, your Honor.”
(Pr. Tr. pp. 152-153.)

Again, on page 13, appellants brazenly and in disregard of the record state

“Appellants were not lawfully informed in the amended pleading or *otherwise* until the actual trial was on, that any claim was made respecting the negligent use and operation of a net” . . ., etc.

An examination of the record of the first trial, the briefs on appeal, and the opinion of this court, will amply demonstrate even to the defendants that the net, its maintenance and operation was part of proceedings in this case for several years past. Quoting from this court’s opinion we recite—

“There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera’s act which consisted of furnishing and ‘maintaining’ parts of its ‘equipment’ and ‘apparatus,’ *namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in*

failing to hold it under her, causing the injuries and the damages to her for which the jury gave its verdict."

His brief, on page 13, further states to this Court:

"The negligence charged in the amended complaint was negligence in the erection, maintenance and setting up of *her* equipment."

Apparently appellants have not recently read the complaint, it recited—in paragraph VI:

"That the defendants and each of them during all times during the rendition of the services by the plaintiff, pursuant to the terms of said contract *did provide, maintain and furnish the maintenance, set-up and erection of the equipment and apparatus used by plaintiff in the performance of her act as trapeze artist.*"

On the foregoing false premise he goes into a long dissertation that "there was no charge in the pleadings that appellants negligently maintained or operated a net . . . erroneous instructions were also given involving a net . . . a variance between and proof . . . and instructions given to the effect that there was a modification of the contract to the extent that a net was provided and used . . ." (Page 14 of Brief.)

These free and easy statements find absolutely no support in the record, none is cited and is spun from the whole cloth in a desperate effort to suggest error where none exists.

REPLY TO APPELLANT'S ARGUMENTS IN THEIR OPENING BRIEF

I.

THE EVIDENCE AMPLY SUSTAINS THE IMPLIED FINDING OF THE JURY THAT GROSS NEGLIGENCE OF DEFENDANTS WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

In arguing their thesis, "there is no evidence of gross negligence or of wilful misconduct," etc. Respondents quote authority to the effect that the word "gross" is "without legal significance" and is "a mere epithet." (*Westre v. Chicago M. & St., etc., Co.*, 2 F. (2d) 227.) Also authority which approves a definition of "gross negligence" which includes the element of "wilfulness and wantonness." (*Seelig v. First Nat'l Bank*, 20 Fed. Supp. 61.)

Opposing counsel rely strongly on *Donnelly v. Southern Pac. Co.*, 18 Cal. (2d) 863. This decision fails to define "gross negligence," as it is regarded by California courts.

In fact there was no occasion for it to do so. It held that "the state courts are . . . bound by federal decisional law" in the field in which the *Donnelly* case belonged. Hence, the opinion sought to identify and isolate the federal law applicable to that case.

However, the *Donnelly* decision and the federal rule are equally irrelevant in this appeal.

If there is any proposition of law which was decided finally and beyond further dispute on the former appeal in this case it is this one. As a disputable question it is no more subject to change in this case than a law of God. Yet respondents attempt to attack and revamp it as the basis for numerous assignments of error among which are the claim that evidence is insufficient to sustain the verdict because "there is no evidence of gross negligence or wilful misconduct."

By associating "wilful misconduct" with "gross negligence" and then showing that the word "gross" is a mere epithet and that wilful misconduct is "wanton and malicious neglect" as the Donnelly decision implies it may be properly characterized, respondent in effect bursts into an undeclared war on the law of the case as it is and declared in *Ringling Bros., et al., v. Olvera, et al.*, 119 F. (2d) 584, which concludes:

"We hold that the last cited provision of the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence and the court erred in refusing the requested instruction concerning their liability *solely for gross negligence.*" (Italics ours.)

This conclusion is based upon the common law as it is said to exist in Florida, and the opinion, quoting from 114 A. L. R. 1467 shows that under the common law relief "from liability for ordinary negligence" might be had by exempting clauses in such agreements as the one involved in the *Ringling Bros. v. Olvera case*.

Hence the entire discussion in Appellants' Opening Brief, pages 44 to 61 inclusive, is futile. It seeks merely to convince this court that the evidence is insufficient to support the verdict, because it is contended, there is "a total absence of the wanton, wilful, or intentional factor, and that "our release clause would still be effective" "as to the epithet type." (Op. Br., p. 50.)

Clearly opposing counsels' entire thesis in this portion of the brief is an adroit, devious but definite attack on the law of the case laid down by this court in the former appeal, wherein, as has been pointed out, it was held that "our release clause" would not be effective" because the common law in Florida only made it effective as against "ordinary negligence."

Also, since it cannot be denied that the evidence in the first and second trials did not differ materially the former decision establishes as the law of the case in the second trial and on this appeal that the evidence is sufficient to show that plaintiff's injuries were caused by "either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling management." (119 F. (2d) p. 585.)

Therefore, in order to relieve themselves of this judicial determination respondents must have shown that the evidence adduced at the second trial was materially weaker in its showing of negligence against the defendants than on the first trial. This the opening brief fails to do, and could not do.

THE DOCTRINE OF "LAW OF THE CASE"

The doctrine known as the law of the case is universally recognized and, as far as its applicability to questions herein involved is concerned, the law is well settled.

In *State of Kansas, ex rel. Beck, v. Occidental Life Ins. Co.*, 95 F. (2d) 935, 936, it is held that matters decided on appeal became the law of the case where substantially the same evidence is presented on a second trial as on the first and are the law of the case in the second trial and on appeal.

To the same effect are:

New York Life Ins. Co. v. Golightly, 94 F. (2d) 316, 319;

De Paroq v. Liggett & Myers T. Co., 81 F. (2d) 777, 779;

Claiborne-Reno Co. v. DuPont T. Co., 77 F. (2d) 565, 566;

U. S. v. Davis, 3 F. Supp. 97, 98;

Gordon v. Green, 66 Cal. App. 303, 25 Pac. (2d) 872;

Penn. Mining Co. v. United Mine Workers, etc., 28 F. (2d) 851, 853.

Rule recognized but evidence different in

Gritch v. Pickwick S. System, 27 Cal. App. (2d) 494;

Henslee v. For, (Cal. App.) 77 Pac. (2d) 307, 310.

EVEN THOUGH ON A SECOND APPEAL THE COURT BELIEVES THAT A RULE OF DECISION ANNOUNCED ON A FORMER APPEAL IS WRONG SO LONG AS THE FACTS ARE THE SAME THE PREVIOUS DECISION WILL BE FOLLOWED.

United States Gypsum Co. v. Columbia Cas. Co., 124 Fla. 633, 169 So. 532;

Lincoln Fire Ins. Co. v. Lilleback, (Fla.) 178 So. 394;

Claiborne-Reno Co. v. DuPont, etc., Co., *supra*;

Snoffer v. City of Los Angeles, 14 Cal. App. (2d) 650;

Gordon v. Green, 66 Cal. App. 650.

Several of the foregoing decisions hold that although the doctrine of law of the case is limited to questions of law, a determining factor is the similarity of the evidence, the material issues in the second case and in the first, and if on the former trial it is decided that the evidence requires a particular finding of fact or the application of a certain rule of law, its decision is law of the second trial and on appeal.

Among such decisions are:

Carpenter v. Durell, 90 F. (2d) 58;

Claiborne-Reno Co. v. Du Pont de Nemours Co., 77 F. (2d) 565;

New York Life Ins. Co. v. Golightly, 94 F. (2d) 316.

In the *Carpenter v. Durell* opinion it is said that the doctrine "is always applied where the former decision relates to the sufficiency or insufficiency of evidence."

Other cases where it was so applied are *New York Life Ins. Co. v. Golightly, supra*, and *De Paroq v. Liggett, etc., Co.*, 61 F. (2d) 777.

It follows that appellants are precluded from being heard in their contention that the evidence is insufficient to support the verdict because no evidence of gross negligence was adduced. This is the gist and substance of appellants' contention under Point I of the opening brief, although much superfluous argument is indulged in concerning appellants' definition of terms not to be found in the decision of the former appeal.

If the term "gross" is a mere meaningless epithet, as respondents contend, the terms "wanton and reckless" are mere meaningless epithets. No. 9 omits these epithets and gives the jury an understandable description of the meaning of the term "gross negligence" as distinguished from ordinary negligence.

Indeed, if the question were still open as to what the general common law is on this question reference need only be made to the cases¹ cited in the epochal decision in *Erie v. Tompkins*, to establish that under

Note¹—*New York C. R. Co. v. Lockwood*, 17 Wall. 367 21 L. ed. 627, 636; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 788, 792; *Eels v. St. Louis K. & N., etc., Co.*, 52 Fed. 903; *Fowler v. Penn. R. Co.*, 229 Fed. 373.

the common law an exempting clause against negligence of any class was against public policy and void.

These or similar decisions were not placed before this court on the former appeal and respondent recognized during the second trial, through its proposed instruction and otherwise, and now submits without questioning the law, that the rule stated in the appellate court's decision and opinion on the former appeal which approves of the exemption from ordinary negligence, is the rule and standard to be met by plaintiff in this case.

DEFENDANTS' REQUESTED INSTRUCTIONS
NOS. 9-A, 32 AND 33 WERE ERRONEOUS AND
REPUGNANT TO THE LAW OF THE CASE.
IT WOULD HAVE BEEN FLAGRANT ERROR
IF THE COURT HAD GIVEN EITHER OF
THEM.

9-A and 33 emphasize the terms "wilful" and "wilfulness," which is no part of the common law or the Florida concept of gross negligence. That element is not within the law of the case and these proposed instructions would impair and ignore the plaintiffs' substantial rights under the law of the case.

No. 32 is not substantially different from defendants' instruction No. 9 which was given.

II.

THE "SO-CALLED" PLAINTIFFS' INSTRUCTION 14-A WAS A CLEAR, CORRECT AND SOUND STATEMENT OF THE LAW AS DETERMINED IN THIS COURT'S DECISION ON THE FORMER APPEAL.

Disregarding as meaningless the epithet "so-called" which appellants apply to instruction No. 14-A, the opening brief challenges this instruction upon several grounds some of which are "incoherent and unintelligible" as criticisms of the instruction itself.

It is claimed that the defendants did not have an opportunity to examine the "redraft" until the jury had retired, and so were prevented from altering "their theory of the case."

After all, there is nothing new or startling in this instruction. It must be assumed that defense counsel were familiar with the evidence which had been received and to which the instruction applied, and with the opinion of this court rendered in the former appeal. Just how within the law laid down in that decision the defendant's theory might have been altered is not divulged; nor does the opening brief indicate what changes were made by the court in the instruction as proposed by plaintiffs' counsel. Consequently this complaint is unintelligible and quite incoherent.

Next the opening brief arbitrarily divides the instruction into "two sections, the first, dealing with the

subject of the apparatus and the second one-half thereof dealing with the subject of the net."

It is then said:

"In the first one-half thereof the word 'or' in line 6 thereof makes it in the alternative and thus eliminates other pleaded defenses."

In truth, there is no such division into two sections in the instruction as it reads.

If upon any reasonable analytical basis a division into sections could be made, there would be three sections. The first would consist of the first seven lines. This much, as pertains to the apparatus and the net, is general. It is a prelude to the special reference to the trapeze and the net. This general section is connected with the others by the conjunction "and."

The word "or," whose use is criticized in the opening brief, by reason of its context plainly preserves the defense of "risks incident to the act" which plaintiff "had contracted to perform," just as it does the defense of unavoidable accident. Opposing counsel fail to name any other defense which, under the evidence, could possibly have been submitted to the jury. None existed.

The answers were in "formula" form. Every defense which is listed in the books as possible to be interposed in an action for personal injuries is set forth in these answers—some in more than one form.

The court is not required to instruct upon defenses which are excluded as a matter of law or because no evidence has been introduced in their support.

The epithet, "formula" attacked by respondents to this instruction, is not *anathema* in court instructions.

The general rule which only requires that the instructions as a whole correctly cover all questions involved for the jury's consideration and it is settled law that no single instruction, formula or otherwise, must state all of the rules governing the jury's arrival at a verdict.

Strangely the opening brief cites *Bee v. Tungsten Corp.*, 65 A. C. A. 1009, as holding to the contrary.

The opinion in that case declares:

"The court carefully instructed the jury on all phases of the case and particularly on the law applicable to trespassers and invitees and the duty owed by defendant to each of them. The doctrine of assumption of risk was correctly explained to the jury. The court also instructed the jury that they were to consider all of the instructions together and as a whole and were to harmonize them so far as possible. It was not necessary for the court to state all of these rules in one instruction. Indeed, in some cases and this appears to be one of them the jury can be better informed by giving the instructions in several parts rather than by including many rules in one single instruction. Conceding, without deciding that the questioned instruction is to be classified as a formula instruc-

tion, it is to be noted that in recent years the rigid rules formerly applicable to formula instructions have been greatly modified and where, as in the present case, the jury has been fairly and fully instructed and has not been misled or confused, a judgment should not be reversed because of the failure to include any one element in a formula instruction." (*Dawson v. Boyd*, 61 Cal. App. 2d 471, 483 [143 P. 2d 373].)

The other case relied upon in the opening brief as especially condemning formula instructions fails to support respondents' theory. The case is *Mazotta v. L. A. Ry. Co. and Finkelstein*, 25 A. C. 163. The trial court's order granting a new trial was sustained, but only on the theory that the Appellate Court will not reverse an order of the trial court granting a new trial unless it clearly appears that it has abused the wide discretion which trial courts are accorded in passing upon that question.

However, the formula instruction which was given in that case was plainly defective because it omitted two *essential elements of the plaintiff's case*. The suit was for damages for personal injuries and the Supreme Court says:

"Certainly, to return a verdict against Finkelstein, the jury was required to find that he was negligent and that Jane Mazzotta was damaged as a proximate consequence of his conduct. Presumably the jury followed the challenged instruction although it does not include either of these issues and only loosely and incompletely touches upon the law of negligence."

The opinion also indicates that the formula instruction was to be treated under the following general rule:

“Accordingly, it has been held that although an instruction may not include all of the factors essential to a recovery by the plaintiff, its use does not constitute prejudicial error where, considered together in their entirety, the instructions fully and fairly charge the jury with the law applicable to the case.” (*Wells v. Lloyd*, 21 Cal. 2d, 452 [132 P. 2d 471]; *Westover v. City of Los Angeles*, 20 Cal. 2d 635 [128 P. 2d 350]; *Miner v. Dabney-Johnson Oil Corp.*, 219 Cal. 580 [28 P. 2d 23].)”

In both of the above cases the party complaining of a formula instruction was able to, and did, point out what essential element in the plaintiffs’ case was omitted.

In this case appellants specify nothing except the defense of negligence of a fellow servant, which defense, the opening brief, on the following page (p. 67), admits was not available in this case. Thus their omnibus complaint which merely asserts a rule and makes no genuine pretense to show its applicability is unintelligible.

In the instant trial the court gave several instructions requested by the defendants by which the jury were repeatedly limited to gross negligence on the part of the defendants as the basis for a verdict against them.

“Defendants’ Instruction No. 11” reads:

“You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence towards her, you must find for the defendants in this action.

Given.

C. E. Beaumont,
Judge.”

“Defendants’ Instruction No. 26” reads:

“The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such gross negligence was a proximate cause of injury to the plaintiff.

Given.

C. E. Beaumont,
Judge.”

“Defendants’ Instruction No. 31” contains a statement similar to Instruction No. 11, and “Defendants’ Instruction No. 9” follows the rule laid down by this court in the former appeal, almost verbatim.

The court also gave defendants instructions which fully informed the jury that it must return a verdict for the defendants if it found that plaintiff’s negligence proximately contributed to her injury.

“Defendants’ Instruction No. 2” reads:

“If the jury find from the evidence that the

plaintiff herself was careless or negligent at the time and place of the accident, and that such negligence proximately contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

Given.

C. E. Beaumont,
Judge."

"Defendants' Instruction No. 27" is to the same effect. (Tr., p. 76.)

Hence, even under appellants' own cited decisions the so-called "Plaintiffs' Instruction No. 14-A" is not subject to attack.

Again, it is appellants' claim that they were misled and "withdrew certain instructions on the fellow servant rule." (Op. Br., p. 65.) Yet, in the next breath (Op. Br., p. 66), it is said "fortunately . . . defendants as an excess of caution, had left three master and servant instructions in the record."

It is submitted that the second statement belies the first. "Actions speak louder than words." Opposing counsel either relied upon the "statements and representations" as they claim or they did not rely upon them. The alleged "excess of caution" proved the latter alternative to be true and the former false.

However, on the following page of the opening brief (p. 67), it is admitted defendants were "precluded" from using "other defenses relating to the

master and servant or employer and employee, such as the 'fellow servant' rule."

Like a tumbleweed on a prairie the opening brief is thus directed by any wind that blows and in its veering course crosses itself up and shows that Instruction 14-A omitted no defense theory which was legally available to the defendants.

The further attack upon instruction, Plaintiffs' No. 14-A, "so-called" by which respondents assert that it directed the jury to return a verdict for the plaintiffs if it "found alone the fact that defendants failed to catch the plaintiff in safety," is refuted by the language of the instruction itself.

It is puerile to argue that

"This instruction had the additional vice of opening the case on ordinary negligence."

No language in said instruction even hints that the jury might return a verdict based on a finding of ordinary negligence. The words "gross" or "grossly" precedes the words "negligence" and "negligent" throughout the instruction, except in the portion which deals with contributory negligence.

Nowhere in this instruction is there language which in any way suggests that

"There was a modification of the contract pulling the net phase out of the exemption clause against negligence."

Respondents fail to point out such language but dogmatically make the above quoted assertion, apparently reserving a specific and answerable argument for the closing brief. Upon this unwarranted premise appellants suggest that "this reopened the case on ordinary negligence in violation of the law of this very case." The wish must have been father to this thought because it has no other father. Nothing in Instruction No. 14-A warrants the series of unexplained assertions set forth on page 63 and the first paragraph of page 64 of the opening brief.

The Sufficiency of the Evidence

It will not be our purpose to argue the question presented by appellants' as to the sufficiency of the evidence at length, since the law of the case, as above pointed out, renders it unnecessary.

Were Appellants' Agents Negligent?

Opposing counsel, in a last stand flurry of desperation, attempt to show that the men holding the net had no time to do anything but remain stationary. They declare that only a little over a second was consumed in her fall because, it is said, "a stationary object falls 16 feet the first second." (Op. Br. 58.) Ergo, it was a waste of manpower and money to employ men to hold the net. Eight or ten posts would have served the purpose as well. It was absurd, if counsel is correct, to expect men to ever save the artist unless she took care to dive into the net.

Of course, they were required to use some intelligence and a modicum of skill.

Besides, according to respondent's purported logic a feather, starting from the stationary, would fall the first 16 feet in exactly the same time, to-wit, one second as a thousand pounds of iron. Ergo, again the respondent, fell twenty feet in a little over one second.

Opposing counsel in pages 53 to 61 inclusive of their brief, in their attempt to show that their agents were not negligent, even in the slightest degree, and that respondent brought her injuries on herself, give the court their opinion on matter of skill and science, matters involving a technical knowledge of general mechanics, the motion and course of swinging bars, the effect of forward and backward and sideways swings, the balancing of the forces thus created, etc., etc. Respondent counsel leaves these matters and the entire argument, made up and premised upon this gratuitous opinion evidence of counsel who might well have saved their client's cause had they been first sworn and testified and allowed the issues to have been determined by the jury with the benefit of their so-called expert opinion.

We leave it with the court without comment but with the utmost assurance that the findings of the jury whose province it was *to weigh the evidence* in the record, will not be disturbed.

In a recent well considered decision of the Supreme Court of California the question as to whether or not

the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such reasonably safe place, we quote the decision of *Spencer v. Beadle, S. S. Co.*, 48 Pac. 2nd, 678 at 680 wherein Justice Schenck made the following pertinent observation:

“The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the Jury on that basis, and we see no prejudicial error in the refusal of the Court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.”

The verdict of the jury was in favor of the plaintiff.

The following language is particularly applicable to the instant case, we quote:

“It is also well settled that under the federal statutes an employee does not assume the risk of the defendant’s negligent failure to provide a safe place to work. *Seaboard Air Line Ry. v. Horton*, supra; *States S. S. Co. v. Berglamm*, supra; *Ziegler v. Alaska Portland Packers’ Assn.*, supra; *The*

Kongosan Maru (D. C.) 282 F. 666; Engfors v. Nelson S. S. Co., *supra*. *The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him, Cincinnati, N. O. & T. P. Ry. Co. v. Hall (C. C. A.) 243 F. 76, 81."*

Under subheading (b) "Review of the Facts Showing There Was No Evidence to Support the Verdict," the appellants instead of quoting the evidence from the record and let this Honorable Court again indicate its views on the matter argues conclusions reached by his own interpretation as to what he believes the result of the testimony indicates viz on page 54 of his brief he recites:

"She (plaintiff), herself, was confused as to what took place. First she said that she saw the figure eight hook *actually in the process* of overlapping when she looked up at the instant of the peak of her swing just before her fall. (Pr. Tr., p. 17, lines 19-31.) Later she said that she did not know when the hook overlapped. (Pr. Tr., p. 215, lines 9-12.)"

Such is not the effect of her testimony and we submit the record. Remember, Miss Olvera was born in Mexico and the record discloses her inability to speak fluent English.

Again under the same point of discussion he waxes eloquent by giving his scientific expert opinion by stating "it is a matter of mathematical or physical

calculation that when she swung forward and back and the side with the long line would swing out *slightly* ahead of the other.” (Op. Br., p. 54.) We respectfully say we “don’t believe it” particularly when both ends of the line are perfectly level and joined together with a bar with the weight of a performer upon it. Counsel then says and assigns his expert scientific reason for this as follows—“The reason for this is that the arc or portion of circle described by a certain radius will be longer than that described by a shorter radius . . . ” etc. (Op. Br., p. 54.) Where does counsel find authority for his so-called scientific, voluntary, extra judicial hearsay opinion? We have searched the record. None is found and no citation referred to. This Court certainly would not take judicial knowledge of such *pseudo* scientific unsworn theories outside the record, when none is found within its covers. There is no evidence in the record that at the time Miss Olvera was performing her act and prior to her fall that one line was longer than the other. There is testimony that the lower bar upon which she performed was level until the eighth hook which was overlapped became unloosened, snapped down and dropped one side of the trapeze throwing Miss Olvera out. Many witnesses saw the uneven trapeze after she fell, and heard the clang of the overlapping metal hook come loose dropping the trapeze. Yet counsel says “cross-examination conclusively establishes this to be impossible.” (Op. Br., p. 57.) Why? Where? and How? Then elucidates this by

referring to the condition as "fantastic" (Op. Br. 57) and concludes by saying—"Plaintiff's claim is too improbable to be worthy of any consideration." Well twelve jurors did not think so. This appellate court in its first opinion believed there was evidence from which the jury could infer *gross negligence*; the second trial jury believed that the defendants were guilty of gross negligence. The trial judge passed upon the same question—yet counsel for appellants are not convinced. Where was the net at the time of her fall? Every witness who testified concerning the net and the employees of the defendants holding the net said not one moved in the slightest degree. We might add parenthetically that Miss Olvera should have been more careful in falling so as to avoid striking the men holding the net—for she struck one of defendants' netmen on the shoulder, before reaching the ground. If he had even seen her fall he might have jumped out of the way to avoid injury to himself. That net was there for a purpose. The employment was hazardous. The net was held by men whose duty it was to "catch her in safety," move the net when movement was necessary not stand glued to the ground and oblivious to their purpose and duty.

The record is complete and amply sustains the jury's finding of defendants' gross negligence.

Under his subheading (a) "Review of Law on Gross Negligence and Wilful Misconduct," page 44 of his brief, he alleges on page 46:

“The lack of pleading gross negligence or facts which would constitute gross negligence was urged upon the District Court on their motion to dismiss the amended complaint, as not stating a legal claim upon which relief could be granted. That this was a fatal defect under the laws of California (forum) we submit the following authorities:”

He then cites

19 Cal. Jur. 676, Sec. 100-pt. 11;

Michaletschke Bros. v. Wells Fargo et al., 50 Pac. 847; 118 Cal. 683;

Nichols v. Smith, 28 Pac. 2nd 693; 136 Cal. App. 272.

Apparently the allegations of the complaint as found on pages 10 and 11 in paragraphs VIII and IX of Pr. Tr. have again escaped appellant's observation. All allegations of defendants' negligence are alleged as “grossly negligent” . . . “gross negligence” . . . and “gross negligence and carelessness.”

Let us again remind appellant the revised rules of Federal Procedure have greatly altered the forms of pleading in the Federal Courts—(all cases cited by appellant respecting the manner and form of pleading are under California procedure and California cases). We shall briefly review this matter though as we do not desire to leave unanswered any suggestion of seeming error suggested by appellants.

It will be noted that the charges alleged in the complaint set forth in Paragraph VIII referring to the erection maintenance and set up of the said equipment referred to in Paragraph V was the maintenance, set up and erection of the equipment and apparatus, "used by plaintiff." The evidence disclosed that the equipment which included the net had been furnished by the defendants and used by the plaintiff in the performance of her act since the beginning of the rendition of her services with the defendant, Barnes Show, some five months previous to the date of the accident.

Paragraph VI of plaintiff's complaint does not limit the allegations to plaintiff's equipment, but in addition included the equipment and apparatus "used by plaintiff."

The revised rules of Federal procedure with which defendants no doubt are acquainted but have failed to cite under this point and the late citations of authority which may be found under this rule leaves this point without any semblance of merit.

Rule 8 of the Rules of Civil Procedure for the District Court of the United States with which we shall not burden this Court by quoting provides for a short and simple statement of the claim showing that the pleader is entitled to relief.

The allegations of the complaint meet this rule. See *McLead v. Cohen Ericks Corp.*, U. S. Dist. Court S. D. N. Y. April 27, 1939---28 Fed. Supp. 103. The following cited authorities are directly in point and substan-

tiate the form of plaintiff's complaint and manner of pleading.

Sierocinski v. E. I. DuPont de Nemours & Co.,
103 Fed. (2) 843;

Hardin v. Industrial Motor Freight System Inc., 26 Fed. Supp. 97;

Satink v. Township of Holland, 28 Fed. Supp. 67.

See also Vol. I, Fed. Rule Service, pages 51-71.

In the *Sierocinski case*, *supra*, the third circuit court through Judge Beadle in interpreting rule 8 observed:

"A plaintiff need not plead evidence. He 'sets forth a claim for relief' when he makes 'a short and plain statement of the claim showing that the pleader is entitled to relief (Rule 8 (a) (2)).' The same rule, (e) (1), requires that 'each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required;' and (f) 'all pleadings shall be so construed as to do substantial justice.' Form 9 in the Appendix of forms attached to Rules, 'intended to indicate . . . the simplicity and brevity of statement which the rules contemplate (Rule 84),' contains this concise allegation of negligence: 'defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.' If defendant needs further information to prepare its defense it can obtain it by interrogatories (Rule 33)."

In the *Satink v. Holland case* the Court struck out particular allegations as not conforming to the rules and observed:

“The Rules of Civil Procedure provide as follows: ‘Each averment of a pleading shall be simple, concise and direct. . . .’ Rule 8 (e) (1), 28 U. S. C. A. following section 723c. With regard to the allegation of prior notice the objection is without merit. However, the complaint unnecessarily elaborates in this allegation to the extent that it invades the prohibition against the averment of evidentiary facts.”

In the *Minnesota case, supra*, the Court said:

“Counsel for the defendant argues at length upon the insufficiency of the allegations, being based upon conclusions rather than facts, to state a cause of action. The requirements of a pleading are substantially set forth in Rules 8 (a) (1-3); (e) (1, 2), and 9 (b), Federal Rules of Civil Procedure.

Equity Rule 25, 28, U. S. C. following section 723, required: ‘A short and simple statement of the ultimate facts upon which plaintiff asks relief, omitting any mere statement of evidence.’ In speaking of the change effected by the new rules, Moore says in his *Federal Practice* Vol. 1, page 553: ‘The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence or law.’ ”

Defendants complain that the Court committed error in instructing the jury upon the question of a net

for the reason that it was not within the issues framed by the pleadings and at variance thereto. Not one item of equipment or apparatus is mentioned, nor the details of construction set forth, nor the manner in which the accident occurred. In interpreting the rules the Appellate Courts where details and evidentiary matter elaborate the pleadings, have stricken such portion of the pleadings as not conforming to the new rules of procedure. (See cited authorities *supra*.)

III.

THE INDEPENDENT CONTRACTOR ISSUE MUST BE DETERMINED BY THE LAW OF FLORIDA AND BY THE LAW OF THE CASE.

The caption to appellant's Point III contains a statement of opposing Counsel's conception and theory of the duties of contractor and contractee in cases where the person rendering services to another does so as an independent contractor. This is entirely proper.

However, when this caption is followed by the statement "We agreed to this statement of facts (Pr. Tr., p. 153, lines 9-12)," although no such agreement is to be found on the cited page or elsewhere in the record, propriety is ended, and respondent's patience ceases to be a virtue.

The only stipulation made was that plaintiff was an independent contractor. (Pr. Tr., p. 153.)

Under this heading of "Independent contractor" defendants have promulgated a purported rule of law, argued their position from such rule and in conclusion have boldly challenged the plaintiffs—"to cite any recognized authority showing facts where an independent contractor recovered damages for injuries cause by unsafe premises. . . ." (A. O. B., p. 72.)

One should not glibly make such bold challenges. This challenge is gladly accepted, and fortunately the cited opinions are both from the states of Kansas and California. In *Brossius v. Orpheum Theatre Co.*, 60 Pacific Reporter Second, page 156, the Court said:

"The trial was before the court without a jury. The Court made a personal inspection of the premises and upon the conclusion of the trial found that the defendants were guilty of negligence. These findings are now attacked. Defendants owed the plaintiffs the duty of using reasonable care in soliciting and maintaining safe the apparatus for his use. The question whether defendant discharged this duty was for the determination of the trial Court. There is sufficient evidence in this record to sustain the findings of the Court on the issues of negligence and contributory negligence."

In the case of *Isnard v. Edgar*, 81 Kansas Reports, page 765, the Kansas Court made the following significant observation:

"Whether the court in its assumption that the deceased was an employee of the appellant was

technically correct or not, we do not deem it necessary to decide. *The obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee.*"

The language used by the Supreme Court of California in *Spencer v. Beadle*, 48 Pac. 2nd 680, is again applicable:

"The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the Court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision."

The verdict of the jury was in favor of the plaintiff.

The following language is particularly applicable to the instant case, we quote:

"It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. *Seaboard Air Line Ry. v. Horton*, supra; *States S. S. Co. v. Berglann*, supra; *Ziegler v. Alaska Portland Packers' Assn.*, supra; *The*

Kongosan Maru (D. C.) 282 F. 666; Engfors v. Nelson S. S. Co., *supra*. *The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. Cincinnati, N. O. & T. P. Ry. Co. v. Hall (C. C. A.) 243 F. 76, 81."*

See also: .

Banclay v. Puget Sound Lumber Co., 48 Wash. 241;

Neimayer v. Weyenhanser, 95 Iowa 497;

Johnson v. Spear, 76 Mich. 139;

Coughtry v. Globe Woolen Co., 556 N. Y. 124.

If any confusion exists on this point it can be found in the jumble of cases which defendant has cited to this Court. Appellants have actually contended and this contrary to all the evidence, that "the only question here is gross negligence relating to the erection of appliances used by plaintiff *and owned and controlled by plaintiff, to-wit: the trapeze, rigging or apparatus, and gross negligence in the operation of a net.* The plaintiff strenuously urged at the trial that the net was a part of her apparatus or equipment." To support this unwarranted remark they cite Printed Transcript, page 163. An examination of this page of the Transcript fails to disclose any such contention.

Miss Olvera testified that she was furnished a net with the Ringling Show since the year 1935 and that the defendants Barnes continued to supply her with

such net for the year 1937. Having undertaken to provide and having so provided this safety appliance to plaintiff for a period of three years continuously prior to the date of her injury, it does not come with good grace after plaintiff has been injured by reason of defendants' negligence in improperly maintaining this equipment to say that " . . . if the net were a part of the apparatus or equipment used by the plaintiff, the net would fall within the provision of contract relating to plaintiff's duty to furnish and maintain the equipment." (O. B., p. 69.) Miss Olvera at no time furnished a net nor maintained a net. The evidence is conclusive that the show furnished, supplied, operated and maintained this safety appliance, and *erected* and set up the trapeze and equipment *used* by her while rendering her performance.

Appellants base their entire contention under this point upon Kansas decisions on the theory that the law of Kansas controls as the *locus delicti*.

This theory overlooks or attempts to hurdle two insurmountable obstacles:

1. The provision of the contract heretofore quoted which stipulates that "all matters whether sounding in contract or in tort, relating to the construction, interpretation and enforcement of this contract shall be controlled by the law of Florida." This stipulation is recited in the former opinion, and it was held that it was competent for the parties to "agree and fix the law controlling all the liabilities and obligations" of

the parties under the contract, "even if the law of the forum is different."

2. Hence, it was held that the law of Florida must be observed in determining the liability of appellants herein and the extent to which they could be exempted, even by contract, for their negligence, whereby such negligence the respondent herein was or might be injured.

The rule which the former opinion laid down was the rule which appellants advocated and the judgment appealed from was reversed because of the trial court's refusal to give an instruction in which said rule was embodied.

The facts pertinent to the question now argued by appellants were then before the Court of Appeal. The provisions of the contract which appellants contend make respondent an independent contractor are set forth in the opinion and the facts pertaining to the net and the trapeze are related therein.

Yet this court upheld appellants in their contention that their proffered instruction correctly stated the applicable law and that instruction read:

"Instruction No. 1-A. You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defend-

ant was a direct and proximate cause of the injury to the plaintiff.

“Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences.”

Obedient to the ruling of this court, in the last trial, this same instruction was given at the defendants' request.

Now, as appellants, they ask this court to hold that said instruction was erroneous; that some other instructions or counter instructions should have been given on the same question characteristically of the opening brief, it does not quote or identify any such other instructions or inform this court what counter instructions might properly have been asked, but it must be assumed that they would have modified or superseded their instruction which is the same as the one above quoted, otherwise, and if the unidentified instructions would not have affected said instruction which was given, obviously, appellants were not hurt.

Respondent insists that the law pronounced on the former appeal bars respondents' entire thesis as it is set forth in their Point III.

It is true that the opinion in the first appeal does not expressly state that in deciding the questions which are therein passed upon consideration was given to the relationship of contractor and contractee between the parties and the duties and liabilities arising from that relationship, yet, appellants' briefs on that appeal urged, just as they do now, that such relationship existed and that a contractee owes no duty other than to refrain from wilful injury, if the contractor is to furnish and inspect his own equipment.

This being the situation and the history of this case the doctrine of law of the case is applicable.

This rule is declared in the Claiborne-Reno Company decision where it is said:

“Again in their former brief counsel for appellant said: ‘The various considerations paid by the appellee included the purchase and maintaining of a stock.’ Other references are made in the brief to the fact that among the considerations moving appellee to enter into this agreement was ‘the purchase of a stock of Duco.’

True, the point that this purchase was the consideration for this contract was not on the former trial below or on the hearing in this court then stressed with the vehemence now here present. But it was in the case. If it was not then so prominently put forward as to attract the attention of this court and demand specific treatment, those things do not detract one iota of vigor from the law of the case rule, for, if this court had overlooked the potency of the point, in the opinion

filed the matter should have been called to its attention by a motion for a rehearing. A very similar situation arose in this court in the case of Mortgage Loan Co. v. Livingston, 66 F. (2d) 636, loc. cit. 640, wherein the above practice is suggested as necessary in a case wherein it was contended that this court overlooked vital and controlling facts in the record, on the first appeal.

We have carefully examined the record and briefs on the former appeal in order to ascertain whether there are any such substantial differences in the facts as should move this court to refrain from applying to this appeal the rule of the law of the case. We have found none such."

Respondent asserts that the framework and substance of appellants' entire thesis in their Point III is trivial and sham.

Plaintiffs' instruction 14-A clearly limits the plaintiff's right to recover to proof of gross negligence on the part of the defendants. It does not, in effect, or otherwise, "direct that there was a modification of the contract" in any respect.

Appellants fail to quote any language to that effect and their mere assertion amounts to nothing.

The repeated palaver about the defendants being given no opportunity to present counter instructions, (Op. Br., p. 64, and again on pp. 65, 66), is not only sham but misleading. This is demonstrated by the discussion between the court and Mr. Coombs on the

hearing of defendants' motion to set aside the verdict and for a new trial.

The trial judge at that time asserted and Mr. Coombs admitted that before the court drafted and gave said instruction 14-A, a long conference was held by the court with counsel on both sides in which the subject matter of this instruction was fully presented by Mr. Coombs and Mr. Corkery, defense counsel, and the court expressed its views very clearly and in the end stated that it would go over the instructions and would itself draft an instruction along the lines of 14-A.¹ (Supp. Tr., pp. 764-768.)

Appellants' complaint that they were misled because it was understood that the case was to be tried "on the theory of gross negligence and on the theory of independent contractor" and so withdrew instructions on the master and servant rule, is likewise shown and false.

The case was tried upon said theories. By said instruction 14-A and Defendants' Instruction No. 9, the theory of gross negligence was given strict adherence, and the court, at defendants' request so told the jury. (R. Tr., p. 63.)

The only confusion or near departures from said theories was caused by defendants' continual attempts to interject the master and servant rule and other defenses which were legally utterly alien to any issue herein involved.

¹This matter will be elucidated further in refuting charges of bias and prejudice, *ante*, Point VII.

POINT IV.

The reply to Appellants' Point IV will probably be given more space than it deserves. However, each of the reasons from which it results that the entire argument presented under the caption, "Assumption of Risk" is fallacious, will be set forth with brevity.

They are as follows:

1. The former decision determined that the law of Florida, and not that of Kansas, controls in "all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement" of the instant contract. This, the contract, itself expressly provides.

2. The Kansas cases quoted in the Opening Brief to support the contention that "The law of Kansas has always recognized the defense of assumption of risk in cases of negligence involving master and servant."

3. The cases cited by appellants are all purely *master and servant* cases. They, therefore, are inapplicable where an independent contractor sues the contractee of injuries resulting from the contractee's negligence. (*Lester v. Graham*, 157 App. Div. 651, 142 N. Y. Supp. 739.)

4. Where the employer provides a portion of the equipment and directs the contractor to use and the contractor acquiesces and uses such equipment which proves defective, the employer is liable for resulting injury of the contractor. (*Gammage v. Internat'l*

Agri. Corp., 268 Fed. 246; *Arizona etc. Copper Co. v. Dickson*, 22 Ariz. 163, 195 Pac. 538; 14 R. C. L. 81.)

5. Appellant's own brief admits that the stipulation heretofore pointed out, that the relation of independent contractor and contractee existed between the parties "precluded defendants from using other defenses . . . relating to master and servant or employer and employee, such as the fellow servant rule." (Op. Br., p. 67.)

6. On the former appeal appellants' herein argued as a ground for reversal that the doctrine of assumption of risk was applicable and presented this assignment earnestly and under a separate caption.

Hence, *it is included in the law of the case as announced in the former decision.*

7. The Florida law holds that the doctrine of assumption of risk, generally applies to controversies between master and servant only.

City of Jacksonville Beach v. Jones, 101 Fla. 96;

City of Jacksonville Beach v. Keller, 102 Fla. 273.

The same decision holds that where this defense does not rest on a contract of employment, it must rest on an act done spontaneously, rendering the party doing it a volunteer.

Respondent was not a servant, and she certainly was not a volunteer.

Defendants have framed their argument upon a false premise of fact. They argue "where employees of the contractee *assisted independent contractor* in arranging her apparatus prior to her performance on same, any plain and obvious defects in the arrangement of the apparatus should have been observed and appreciated by the independent contractor under her contractual duty of inspection where independent contractor could qualify as an expert in such matters, and any defect such as claimed by plaintiff should have been observed, and the Court erred in refusing to give the defendants' requested instruction on this point." (A. O. B., p. 74.) This statement is contrary to the weight of the evidence the verdict of the jury and made without reference to or support from any citation of evidence. In effect it asks the court to believe defendants' witnesses and disbelieve plaintiff's, contrary to the verdict, and as such is an argument on the jury's determination of a disputed question of fact. Where is there any evidence anywhere in the record that plaintiff set up or erected her rigging or that defendants' employees "assisted" her in such endeavor? Plaintiff's testimony supported by other witnesses, discloses that she at no time erected or set up her rigging or equipment. This service had been undertaken by the defendants, Al G. Barnes Circus and Ringling Bros. Barnum and Bailey Show and had been provided plaintiff since her initial contract with Ringling Bros. Show in 1934. The assumption therefore by appellants that the "contractee assisted the independent contractor in arranging her apparatus prior to her performance" is without support in the evidence. What

appellants sought to convey by suggesting that defendants' employees "assisted independent contractor in arranging her apparatus" we can only venture a surmise. "Arranging" the apparatus might suggest setting up and erecting the rigging to defendants, but it has not confused plaintiff and we believe this court will not be misled by the play on words.

The contract provided that "... artist for himself and the personnel of his troop accepts all risks incident to the business." (Paragraph 12 of the contract) and is a part of the much discussed exemption provision on this subject. The Court gave the following instructions:

"In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover if her injuries were caused by such danger and peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as the plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.

Given.

C. E. Beaumont,
Judge.

Parker vs. Wichita, 92 Pac. (2) 86; 150 Kan. 249;

Fritchman vs. Chetwood Battery Co., 8 Pac. (2) 368 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584."

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Both negligence and proximate cause, as defined in these instructions, are requisites for founding liability.

Given.

C. E. Beaumont,
Judge.

California Jury Instructions (Civil) 63 and 62 as adopted for use in the Superior Court of Los Angeles County, California.

G. [85]."

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at

the time of her accident and that there was a defect in said apparatus which was the proximate cause of her fall, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

Given as modified.

C. E. Beaumont,
Judge.

Fritchman vs. Chetwood Battery Co., 8 Pac. (2) 368 (Kans.);

Barnes vs. Akins, 166 Pac. 474 (Kans.) [71]."

The requested instruction which the defendants claim the court failed to give appearing on page 79 and 80 of their brief, *is not a correct or proper statement of the law*. The instructions given by the Court as before enumerated and as found on pages 48 to 80, Pr. Tr., contain a correct statement of the law on the question of assumption of risk as the following authorities will disclose.

The theory of assumption of risk has universally arisen from the relationship of master and servant. The risks usually assumed by a servant are those ordinarily incident to his discharge of the duties in the particular employment. Because of the close association of the doctrine of assumption of risk and con-

tributory negligence it is difficult to draw a true line of distinction. (39 Corpus Juris., Page 684.)

It has been recognized as a universal proposition of law that "risks arising from the negligence of the master or those representing him are extraordinary risks not incident to the employment." This rule of law has been long recognized and appears to be universal. The words of the contract that "plaintiff accepted all risks incident to the business" are the words of the contract and defendants' argument that the contractual obligation and the common law liability call for a different instruction falls by comparison.

The following quotation is cited in the text of Corpus Juris and supported by decisions from all jurisdictions of the United States:

"Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence under the general rule as to extraordinary risks, but subject to limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks of dangers." (39 Corp. Juris, p. 692) and "risks which result from the negligence of master, that is to say those risks which are avoidable by reasonable care on his part are

not assumed by the servant." (39 Corp. Juris, p. 692.)

In the footnotes to these statements of law are found citations from practically every jurisdiction in the United States including Kansas, Florida and California which we cite:

Kansas:

McMullen v. Atchison, etc. R. Co., 107 Kan. 274, 191 P. 306;

Emporia v. Kowaiski, 66 Kan. 64, 71 P.;

Cherokee, etc. Co. v. Britton, 3 Kan. A. 292, 45 P. 100.

Florida:

Logan Coal etc. Co. v. Hasty, 68 Fla. 539, 67 S. 72;

Fitzsimmons v. Cesery, 61 Fla. 199, 55 S. 465;

Stearns, etc., Lumber Co. v. Fowler, 58 Fla. 362, 50 S. 680.

California:

Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 P. 695;

Sanborn v. Madera Flume, etc. Co., 70 Cal. 261, 11 P. 710;

Beeson v. Green Mountain Gold Min. Co., 57 Cal. 20;

Barter v. Roberts, 44 Cal. 187, 13 Am. R. 160;

Werner v. Southern Pacific Co., 44 Cal. A. 76, 185 Pac. 1016;

Kreitzer v. Southern Pacific Co., 38 Cal. A. 654, 177 Pac. 477;

Lippert v. Pacific Sugar Corp., 33 Cal. A. 198, 164 P. 810;

Hayes v. Western Fuel Co., 19 Cal. A. 634, 127 P. 518.

Any reference in appellants' brief to the Workmen's Compensation Act of Kansas or Florida is superfluous. They have admitted that plaintiff is an "independent contractor," but argue with misplaced earnestness that "the defense of assumption of risk would apply as between contractor and contractee to an even greater extent than between master and servant especially where the assumption is not implied but contractual." (Page 76 O. B.) This argument is spurious, without authority of law and contrary to the cited decisions. To urge upon this Court because plaintiff accepted "all risks incident to the business" that defendants in the erection of plaintiff's rigging and the maintenance of the equipment *used by her that acts of negligence* committed by defendants such as "loose guy wires, kinked chains or hooks, trapeze bars uneven and unlevel, and a risk due to a failure on the operation of the net in catching the artist in the event of a fall" were risks accepted by her, the occurrence of any such happening might result in plaintiff's death or serious injury certainly is not a risk incident to the business. *Assumption of risk "incident to the business" does not mean assuming the grossly negligent*

acts of another. It is not an incident to the business that permits overlapping hooks or uneven bars or failure to move a safety net a fraction of a foot to catch the plaintiff in the event of a fall for whatever reason such fall occurred. These acts of defendants were not incident to the business but gross negligence by defendants in the performance of a duty owed to plaintiff.

The law of Kansas enunciated by its Supreme Court has repeatedly held that an employee does not assume the negligence of the employer or of those for whose conduct the employer is responsible. The employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, and this includes care in establishing a reasonably safe system or method of work.

“According to our decisions the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.”

McMullen v. Railway Co., 107 Kan. Reports 282,

and again at page 283 of the same opinion quoting from *Ches. & Ohio Ry. v. Proffit*, 241 U. S. 462:

“To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer’s negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer’s negligence.”

This argument is equally true whether the relationship found to exist is between employer and employee or independent contractor and contractee.

“The obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee.”

Isnard v. Edgar, 81 Kans. 765,

and the following citations are cited by the *Isnard v. Edgar case, supra*, with approval:

“Whether the owner furnishes machinery to a contractor while work is being done upon his premises and injury results through his fault in not keeping it in suitable and safe condition, he is liable to any servant of the contractor for an injury resulting to him from the defects therein and his liability arises out of his obligation to provide safe appliances for the contractor to use and to keep his premises in safe condition independent of any contract provision to that effect.”

Johnson v. Spear, 76 Mich. 139, 15 A. M. St. Rep. 298;

Emporia v. Kowalski.

“It is the duty of a master to furnish a safe place for his servants to work, and reasonably safe tools and appliances to work with, and the employee, without instituting an investigation to ascertain the condition of the premise, may assume that the master has performed this duty.

“It is contended that the defendant assumed the risk of injury from the falling of the pole, and, therefore, cannot recover. While it is true that the employee assumes the ordinary risks incident to his employment, the risks thus assumed by him, however, are those only which occur after the due performance by the master of those duties which the law imposes upon him.”

Pantzar v. Tilly Foster Iron Mining Co., 99 N. Y. 368, 2 N. E. 24;

Stringham v. Stewart, 100 id, 516, 3 N. E. 575;

Benzing v. Steinway & Sons, 101 id, 547, 5 N. E. 449.

In California citation of *Brosius v. Orpheum Theatre*, 60 Pac. 2nd, 156, the Court said:

“Defendant owed to plaintiff the duty of using reasonable care in selecting and maintaining safe apparatus for his use. The question whether defendant discharged this duty was for the determination of the trial Court. This is sufficient evidence in the record to sustain the findings of the Court on the issue of negligence and contributory negligence.”

That defendants provided, maintained and set up the poles, tents and equipment where plaintiff was required to render her performance like those of many other performers in the circus is undisputed.

Under the rule of law enunciated in *Isnard v. Edgar*, 81 Kansas 765, that “the obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee,” permits us to examine the rules of law enunciated under either relation for guidance. That the doctrine of “assumption of risk” and “whether plaintiff knew and appreciated the danger” and whether or not “the employee assumed the risk was a question of fact for the jury, like that of the employer’s gross negligence and in determining it the jury should take into consideration all of the circum-

stances and surroundings." "The finding of the jury on the subject is controlling."

See:

Fritchman v. Chitwood Battery Company, 134 Kansas 727.

Also:

Railway Co. v. Bancard, 66 Kansas 81;

Whetstine v. A. T. and S. F. Railway, 134 Kansas 509;

Tecza v. Sulzberger & Sons Co., 92 Kansas 97;

Wagner Electric Corp. v. Snowden, 38 Fed. 2nd 599;

Hook v. Railway Co., 116 Kansas 556.

In the *Whetstine v. Atchison T. & S. F. Ry. case*, *supra*, the court said:

"An employee, of course, assumes the ordinary and obvious risks incident to the service he engages to perform, and if he becomes aware of a danger arising in his employment or it is one that an ordinarily prudent person would observe and appreciate, and he continues in the employment, he would assume the risk. If the negligence and danger are not obvious or come up suddenly and cannot be anticipated, or the negligence of the coemployee is such that the employee has no notice or reason to anticipate the risk, it is not assumed. There are circumstances and elements of the assumption of risk which are matters of fact to be decided by the jury and here the findings are in favor of the plaintiff."

In *Smith v. Railway Co.*, 82 Kansas 136, the following language was used:

“If the jury believe the plaintiff’s testimony that he did not know of the condition of the ties and rails, it disposes of the defense of assumed risk.”

Of particular importance is the language found in *Tartar v. Missouri K. T. Rd. Co.*, 119 Kansas 738 at 740:

“Assumption of risk can be declared as a matter of law where an employee sees the danger, knows what its consequences may be, and continues his work with that danger confronting him. Assumption of risk cannot be declared as a matter of law unless the employee knows, or should know, what the danger is and knowing the danger continues in the performance of his labor.” . . .
 “The jury found that the plaintiff did not assume the risk, and in effect found that, although plain to be seen, the plaintiff from his position did not see the danger. The findings of fact did not show that the plaintiff assumed the risk.”

V.

CONTRIBUTORY NEGLIGENCE

Appellant’s failure to do more than show adherence to the contributory negligence defense, without which, an answer in a personal injury case would be a legal curiosity warrants the inference that their defense theory is not being seriously pressed.

Their counsel undoubtedly realize that this was purely a question for the jury and that defendants are foreclosed in an appeal following the second trial from raising this defense because on substantially the same evidence, on the first trial and after giving due consideration to appellants' argument in their briefs that Olvera's own negligence caused her injuries. This court held, on the former appeal that, as a matter of law, there was evidence warranting the jury to infer that *either gross or ordinary negligence of the defendants caused plaintiff's injury*, and, also, that there was sufficient evidence of such negligence in setting up the trapeze and failing to hold the net under Olvera.

In Appellants' Opening Brief on the first appeal this defense was made a major ground for reversal. It was claimed that it was contributory negligence for plaintiff not to inspect the net (although no amount of inspection of the net, or of anything about it, other than the heads of the net holders, would have revealed the peril of their standing as though glued to the ground, while the artist fell just beyond where they rigidly held the net.)

It was claimed that the artist was negligent in not falling into the net, and that is intimated, in the instant opening brief (p. 9), where it is said, "she missed the net by about a foot and three inches."

It is amazing to what lengths and heights and depths of absurdity fervor for a cause will lead even the most logical and talented minds. An example of

such absurdities in the opening brief is the statement that the artist "missed the net"! It must be admitted that the net holders did not miss the artist, nor did the net, itself, for the net could not move itself and the men, whether through incompetence, impotency or indifference, no one can know, made no move toward shifting the net and using it for its intended purpose.

In the former opening brief appellants reproached the plaintiff and her husband for not inspecting the trapeze as it rested in the air thirty-five or forty feet up where inspection from the ground would have been impossible, and, besides, as the reply brief pointed out, Barnes' managing agent, Cronin, had told Olvera "not to inspect your apparatus." Our "boys do that."

True, the opinion in the former appeal does not directly mention contributory negligence, but it does so by necessary implication, and it would not be strange if the Court had not regarded such contentions as were made, as above related, as warranting judicial consideration.

Under the authorities which have been set forth, especially *Claiborne-Reno Co. v. DuPont, etc., Co.*, 77 F. (2d) 565, 568, it is the law of the case that there was evidence from which the jury might properly infer that Olvera was not contributarily negligent.

VI.

CONSTITUTIONAL RIGHTS

Appellants' aver that their constitutional rights under Amendments V and XIV of the Federal Constitution have been violated. Respondent denies the allegation. She can do no more. Appellants provide no hint of the basis for their claim except that it is asserted that there has been a failure to apply "the contractual provision relieving defendants of liability." This might be true and still leave said constitutional provisions unimpaired.

VII.

BIAS AND PREJUDICE CREATED AGAINST
DEFENDANTS

This point in the opening brief appears like the final taper of a mouse's tail.

This tapering began to be marked with Point IV.

In the trial Court the issue as to bias and prejudice was launched with much avidity and confidence. Alleged grounds for a new trial in defendants' motion include misconduct of the Court and plaintiff's counsel in several respects, and the affidavit of Lee Combs charges very serious misconduct by these two Court officials. In substance and effect one charge was private discussions between them in the Judge's chambers concerning the instructions and actions of the Judge in respect to an instruction which was claimed to be misleading to defense counsel; a number

of acts and statements by the Court showing bias and prejudice against the defendants' cause and misconduct of the plaintiffs' attorney during the argument, and, "that the course and conduct of the Court as indicated was one of bias and prejudice and said course, consistently carried out," developed and created a prejudice in the mind of the jury against the defendants from which the verdict rendered was "the result of passion, prejudice and influence."

These are serious accusations. The last one being a positive statement of alleged fact, and not merely one based on probability or counsel's belief, or even information and belief, *should not be made by any lawyer without some substantial evidence.*

However, although the caption to Point VII in the opening brief presages the pressing of these asseverations without reservation, the presentation of the question which follows is tantamount to an abandonment of the bias and prejudice issue as to the Court, for after mildly asserting that numerous comments of the Court gave the jury an impression that the Court was unfavorably disposed to defendants' case, that matter is dropped with a mere reference to Paragraph X of Appellants' Statement of Points to be relied upon on appeal, without even a citation of the transcript page where such statement may be found. (For said Paragraph X see R. Tr., p. 546, et seq.).

This statement contains several pages of quotations of language used by the Court, many of which are only one line in length, and none of which *per se*

indicate bias, prejudice, plain error, or anything other than a ruling, presumably sound, by the Court.

Able and learned counsel must know that it is not to be expected that an appellate court will brief an appellants' point for them, especially for the purpose of ferreting out some excuse to reverse a judgment upon a misconduct charge against a public official.³

Again, the mere mention of an assignment of error in a brief, without sufficient argument or citation of authority in support thereof must be treated as waived.⁴

Hence respondent may properly assume that the charges of biased and prejudiced comments have been abandoned.

However, since the "Statement of Points," etc., include a general claim of biased and prejudiced "attitude" on the part of the Court respondent feels that it is due the trial Judge that this reflection and unwarranted aspersion be removed by a determination on appeal that it has no factual foundation.

Appellants' counsel are, therefore, challenged to meet this issue in the closing brief and to explain upon what facts said assertion was made in said affidavit and "Statement of Points" referred to in the opening brief.

That brief glides over this matter and all assignments of misconduct of the court in the affidavit above

³See 5, C. J. S., pp. 1230, 1231 and cases cited.

⁴See 5, C. J. C., pp. 1532, 1533, Where cases are cited from many jurisdictions..

mentioned as though ashamed to directly and openly face the issue and to expose how insipid are appellants' charges by quoting the language of the Court with which the epithets "misconduct," "bias" and "prejudice" have been labeled.

The opening brief (pp. 82, 83), states that the Court made "numerous comments during the course of the trial" to the defendants' detriment and the plaintiffs' advantage but ceases to use the term "misconduct"; and in lieu of pointing out the comments and acts of the Court which are claimed to have given the jury impressions that the Court was "unfavorably disposed to the defendants' case," reference is made to another document.

We assert that not a single item in that enumeration, when read and judged by its context is reasonably capable of being regarded as exhibiting prejudice in the slightest degree.

We insist that it was opposing counsel's duty in briefing such serious charges to point out how these assignments warrant their criticism and condemnation.

Failure to do so must be construed as either a confession of weakness or an attempt to place the burden of elucidation upon respondent to prove the Court's innocence.

We decline to be placed in that position but claim the right, if the closing brief attempts to perform its clear duty in this behalf, to reply thereto.

The several pages of such assignments, detached from their respective contexts are incoherent and unintelligible.

However, as an example of the unfairness of the procedure which respondents have followed and the entire innocence of the alleged prejudicial comments let us take the one first in the list. (Pr. Tr., p. 746.)

The item reads—

“She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don’t mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?”

This statement by the Court was immediately preceded by a question by Mr. Marcus on direct examination of the plaintiff and an objection by Mr. Combs, which read:

“Q. Is there any way of counteracting for this overlapping hook by any guy lines or ropes?

MR. COMBS: I object to that as calling for a conclusion.

Q. BY MR. MARCUS: Is there any way of making this bottom bar level in the event that this 8 hook overlaps, as it does?

MR. COMBS: I object to that as calling for a conclusion of the witness.” (P. Tr., p. 158.)

The witness had previously testified that when she was five years old her father began training her on the trapeze. She detailed such training and said that at the age of eight she began to travel with the circus, performing her act on the trapeze for Ringling Bros. and Barnum & Bailey in Europe and other foreign countries (P. Tr., pp. 147-150), and continued to perform the same act with Ringling Bros. from 1933 to 1936. (R. Tr., p. 151.)

The witness had explained the make-up of her apparatus, "the big main falls," the "heavy rope with blocks" (which were offered in evidence); she had shown how the parts of the apparatus were connected with the rendition of her act. Using the apparatus itself, she told and showed in detail how the clevises, hooks, guy lines, and bars are placed and connected and fastened to iron stakes or to the tent roof or tent poles and how the main bar would be made level; She had explained how bars should be adjusted and how the bars are suspended by "those rods and ropes," and the meaning of these terms.

Olvera had testified that she had used "that same bar all her life," referring to the one on which her performance is done, it being the "trapeze bar that has stars"; had pointed the height of the bars, and other details both of the construction and operation of apparatus parts. (R. Tr., pp. 154-156.)

Using the apparatus itself, the witness had shown the effect of an overlapping 8 hook, and no objection

had been made to any of the expert testimony with which her testimony had been honeycombed.

This is the point at which Mr. Combs objected to a question as calling for a conclusion of the witness, and the Court said (Pr. Tr., pp. 158-159):

“THE COURT: She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don’t mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?

A. I would like to hear it again.

Q. BY MR. MARCUS: In the event this 8 hook is overlapping, as it does, the guy lines that you testified to before, that come off of this clevis to the ground, can they be adjusted or pulled in any way so as to make the bottom bar level?

A. Yes, sir. [16]

MR. COMBS: I object to that as leading and suggestive. He is telling the whole story himself, and asking for a yes or no answer.

THE COURT: In the case of *People v. Jones*, 160 California, Mr. Combs—if I have that citation correct, and I believe I have—the mere fact that a question calls for a yes or no answer is held not to be leading; but it is important that you do not lead or suggest to the witness, Mr. Marcus. This is a very important phase of the case, apparently. I think you should first show how that 8 hook you refer to should hang ordinarily. I think that should be brought down just as the other one is. Proceed, Mr. Marcus.

Q. BY MR. MARCUS: Will you tell us how, when the hook is in the position that it is—

THE COURT: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

MR. MARCUS: The 8 hook overlaps the ring on the upper bar.

THE COURT: The top part of the 8 hook?

MR. MARCUS: That is right."

This is a fair sample of the most serious of the alleged acts of misconduct and comments by which Mr. Combs swore that bias and prejudice of the Court was shown. The correctness of the Court's ruling is not challenged nor does the opening brief attempt to criticize the Court's language, manner, intentions or anything else about it except by referring to a document which merely refers to the matter in a general way, employing such terms as "bias" and "prejudice."

This court is asked to hold that without reference to their context the trial Court's comments constitute prejudicial misconduct *per se* and reveal a biased and prejudicial attitude. *Such a course and this procedure is inconsistent with good faith when employed by experienced and able counsel.*

In fairness to the trial Judge we shall quote at length his reply to appellant's counsels accusations of bias and prejudice as appears in the Supplemental Transcript, pages 768 to 782 inclusive, which appellants have failed to do:

“Los Angeles, California, Tuesday, March 7, 1944;
10:00 A. M.

THE COURT: The court intended to rule on all of these matters now, but will rule only upon the motion for judgment non obstante veredicto. I think that that motion should be denied, and it is. But as to the motion for a new trial, I am going to give further consideration to the instructions.

I endeavored to give the instructions which I thought covered the issues, but no matter how careful either counsel or the court may be in preparing instructions, we never know how proper they are until they are viewed in a more detached way, which comes when a motion for a new trial is made, or upon appeal.

But of one thing I am very, very sure, and that is there was no bias on my part, no prejudice whatsoever. I certainly never have sat in a case in which I have been prejudiced at all. There have been cases in which I have had some particular feeling, either that I was in favor of or adverse to a party, and I have disqualified myself. There have been other cases in which there has been some appearance, perhaps, for some party for whom I had been attorney maybe years before I had gone on the bench, or where, perhaps, some person during the time I was in the State court, and had to run for office, had been very active either for or against me in my election, or some other instance, where the possibility of a business affair which would not disqualify [8] me, but which, if unexplained, might indicate that there was some connection between the party and the court, and I have been so careful about those

things that I have leaned backward. In fact I have been criticized at times for doing so, and for doing so under such circumstances, sometimes, where it was said by those who did not like me that I was trying to escape a difficult situation by having some other judge try a case. Those are things which each judge has to determine for himself, and that I have done; but, certainly, I have never sat in any case in which I have been biased, or in which I have had any feeling of prejudice whatsoever, and I think, looking at it as I do, I would be the first one to know that.

However, I was impressed with what Mr. Combs had said, even if he did not question the sincerity of the court, that the court might, without its own knowledge, have done things which would indicate a leaning toward the plaintiff, and I tried to review some of those things. I can't think of any.

Certainly, during the course of the trial the judge has to rule, and at times to give an explanation for his rulings. The judges of the court are no more perfect than counsel are. They may say things which at the time appear to be entirely proper, which, when viewed later might carry with them some implications that were not intended; but in a protracted lawsuit that is likely to happen. There would never be a judgment that would be sustained if every [9] little word which came up, or every word which the court used, would be scrutinized in the strongest light. The purpose of courts is to do substantial justice. We can all make mistakes. We are all human, and as long as we are, we are going to make mistakes.

One of these things I recall, and I am sure all of you gentlemen will recall, is that in the discussions as to certain instructions—I think they were the instructions upon damages—there was an objection which was in writing, and which were filed. The court asked that they be filed, and they were filed. At that time they were not filed, and we were discussing them Saturday morning in my chambers, and I said I did not believe that the defendants' objection was sufficient; that it would not come within the provisions of the rule. Mr. Corkery asked if I had in mind that it wouldn't be specific enough. I said, 'Yes, Mr. Corkery'—no doubt, you will recall I have done that throughout the trial—'I don't care anything about one party or another. It is all in the day's work for me, but I do want to see proper instructions. And I also like to see that the parties keep their record. If they want to make a record of the rulings of the court that, of course, they have a right to do.'

The day before the trial of this case—I think it was on Monday—Mr. Marcus, before the beginning of the law and motion calendar, approached the lectern, and Mr. Combs [10] was there. He said Miss Olvera wanted to amend her complaint to ask for a greater amount of damages, and without waiting for Mr. Combs to object I said immediately 'I think the court knows enough about this situation to deny that motion.' I thought that the motion had not properly been presented, and that no affidavit had been made to show that there was any change, so that was my immediate reaction. I think throughout this trial

both parties will find places throughout the record where I made suggestions to counsel, and statements that the court made regarding what its rulings were. In considering the motion for a new trial, of course the court will consider the evidence as presented in this case, not only on the question of damages, but upon all other questions.

As I say, it really was quite a surprise to find that I had been charged with bias and prejudice in this case, when I knew that I had none. I try to be fair to everyone, no matter who he is, and I considered the fact that Mr. Combs had said that without the court's knowing it even, prejudice might have been reflected. I knew I did not have any prejudice, but at the same time I had that argument in mind, so I read over parts of the transcript—not all of it; I did not read Mr. Polinger's testimony, but I read Miss Olvera's.

Here is a time (referring to transcript of Miss Olvera's testimony at the trial), when I thought Mr. Marcus was taking up too much time with the examination of Miss Olvera on direct examination. I don't like to interfere. [11] I don't like to interrupt. I figure that the attorney knows more about this case than I do, but, of course, the court had this before it: The case had been tried once before, and I felt that the appellate court had crystallized the issues quite well, and that it had fixed the law of the case upon certain of the issues. So, after a long answer, beginning on page 5, line 7, and continuing over to page 6, line 2, I interrupted Mr. Marcus, as follows:

‘THE COURT: Mr. Marcus, do you think it is important to go through these details, until she

did attain the position of a recognized trapeze artist?

‘MR. MARCUS: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

‘THE COURT: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don’t think it is important.’

That was for the purpose of saving time. It is the duty of the court to direct the progress of the trial. Page 8 the court again interrupted. A question had been asked by Mr. Marcus, and Mr. Combs said:

‘We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. Circus.

‘THE COURT: Isn’t that sufficient? [12]

‘MR. MARCUS: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

‘MR. COMBS: I don’t know that. If you will ask her.

‘THE COURT: Let me ask you: In view of the appellate court’s decision in this matter is that important?

‘MR. MARCUS: I don’t think so.

‘MR. COMBS: No.’

There we were all in agreement, but the question was asked by the court for the purpose of saving time, a proper direction, as the court believed,

of the course of the trial, and without any thought as to whom it should benefit at all. That did not have any part of the court's mind. On page 9 a question was asked by Mr. Marcus:

‘Q. Relate the conversation to the jury, at the time the contract was executed.

‘THE COURT: What is the importance of it when you have the contract received in evidence?’

It might have been Mr. Marcus had something very important in mind, but I did not consider it was, and that is the reason I asked him the question, and, as shown by statements of counsel as follows, they agreed with the court:

‘MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes Show; that she was received there, and employed by that show under the terms of that contract.” [13]

On page 10 the court said:

‘Might it not be agreed that she was an independent contractor?’

‘MR. COMBS: Yes.

‘MR. MARCUS: So stipulated, your Honor.’

On page 28, Mr. Combs stated:

‘I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated without having to make it each time, after each question.

‘THE COURT: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

‘MR. MARCUS: Yes.’

I think that is another indication of the readiness of the court to agree to anything that would preserve the record, in this instance in favor of the defendants. On page 36, line 24:

‘MR. COMBS: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct.

‘THE COURT: The court will admonish counsel to avoid leading questions.’

Which I think I did from time to time throughout the trial. Mr. Marcus did ask a number of leading questions, as lots of counsel do. Ordinarily they are not objected to unless they get right down to a very important matter or very important issue, and Mr. Combs took that position, [14] a time or two, that while the questions were leading, they happened to be more preliminary than otherwise, and did not get right down to the important parts. In fact, right on the same page, line 19, is the following:

‘THE COURT: Mr. Marcus, I wish you would bear in mind the court’s admonition. However, this seems to be preliminary.

‘MR. COMBS: I don’t care about it unless it gets up to the point where it is critical.’

Then I added:

‘A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them.’

I had in mind, of course, objections made where they were leading, and that it was the duty of the

court to sustain them. On page 40, line 22, an answer was made by Miss Olvera, and Mr. Combs stated:

‘If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel’s questions are leading and suggestive.

‘THE COURT: You may make your motion to strike out, if you think you would like to have the court consider it.

‘MR. COMBS: I don’t want to hamper the speed, of course, [15] of this trial, but I have to combat with this persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can’t anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

‘THE COURT: Would you read Mr. Combs’ statement?

‘(Statement read by the reporter.)

‘THE COURT: Proceed.’

The court still thought he should proceed, as he had given Mr. Combs an opportunity there to make his motion if he desired, as I would any counsel in any case. I think you will recall, during the course of the trial, a matter which occurred out of the presence of the jury, when the court itself had excused the jury, there was some statement about the ruling of the court, and that the court’s

mind was already made up. I explained to Mr. Combs that the court's mind was not made up; that the court did not foreclose its mind until the matter had been entirely submitted; and he had a right to argue the matter at any time. I don't recall about that, but I think I ruled in favor of Mr. Combs. But, in any event, before the jury returned. I think I called attention to the fact that Mr. Combs had made this statement, and he very properly stated that during the course of the trial, in the heat of it, statements are made which are not given full consideration, and asked to apologize, and did apologize to the court. I said the [16] apology was accepted, as the court understood these things; and the court does understand them, and is always inclined to be very lenient with the statements that are made under such circumstances. But I think considered statements that are made otherwise should be given their full credit, always taking, of course, into consideration the fact that any of us may be mistaken as to matters of memory. Page 68, line 22, a question was being asked by Mr. Combs of the witness Olvera:

'You don't mean to give the jury the impression—'

Then I interrupted Mr. Combs, stating:

'I think you are asking about what the custom was when she was performing her act. She was referring to the very last act.

'MR. COMBS: What I am trying to bring out is the fact that they remained there stationary right in the center under the trapeze during the entire period of time.

‘THE COURT: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

‘MR. COMBS: Let me see if I can clear that up.’

There the court was endeavoring to clear up a point, where I believed Mr. Combs was asking questions about one thing and the witness was answering about another. There is another question on the same page, line 8, where Mr. [17] Marcus interposed this objection:

‘MR. MARCUS: I object to that as calling for the conclusion of the witness.

‘THE COURT: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled.’

On page 74, line 16, Miss Olvera answered:

‘Yes, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men.’

She at that time pointed to one of her shoulders. I said:

‘You are referring to your right shoulder?

‘A. Yes, right here; not on the shoulder. I struck in here.

‘THE COURT: You changed around to your left shoulder.

‘Q. BY MR. COMBS: Was it his right shoulder?

‘A. I try to show you. I don’t remember.

‘Q. BY THE COURT: You don’t know whether it was the right shoulder?

‘A. No, I don’t.’

There I noticed that she had changed from one shoulder to the other, and pointed to it, and I thought it was proper to call that to the attention of the attorneys, and I wasn’t interested in whose favor it was. I just thought that was an inconsistency or discrepancy that attention should be called to. [18]

Page 86, line 19, the following appears:

‘THE COURT: In any event it calls for the conclusion of the witness. Mr. Combs, you don’t mind the court suggesting something?’

‘MR. COMBS: Not a bit.’

‘THE COURT: In your questions you have used the phrase a number of times “I take it” such and such. Just ask the question directly, and I think it will be more definite.’

‘MR. COMBS: I will withdraw it and reframe it.’

I think afterwards Mr. Combs did change that. A time or two he used the same expression, but he changed it, as I stated I believed it would be better to ask the question directly. I have never hesitated to make suggestions to counsel during the course of the trial, because I only had in mind one thing, and that was to see that all the parties got a fair trial. I may say that judges vary in their actions in the trial of a case. Some judges take a very large part in the trial of a case, and some hardly say anything, but judges are different, just as lawyers are, and they have to do these things according to their own views and their own temperaments. On page 87 Mr. Combs had asked

a question, to which there was an objection, and Mr. Combs said:

‘MR. COMBS: Just answer the question; if she saw anybody do anything.

‘MR. MARCUS: Ask her that question.

‘MR. COMBS: Did you?’ [19]

Then the court asked to have the question read.

‘THE COURT: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained.’

On page 88 there is another example. The court noticed a mistake in the use of a word, and thought it should be called to the attention of the attorneys. It was on cross examination. On line 8, Mr. Combs said:

‘Q. Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn’t it?

‘A. What?

‘THE COURT: Read the question, Mr. Dewing.

‘(Question read by the reporter.)

‘THE COURT: Do you mean act or action?

‘MR. COMBS: I mean act.

‘THE COURT: Reframe your question.’

Mr. Combs then reframed the question, and used the word ‘act.’ I thought he meant ‘act,’ but that he had inadvertently used the wrong word.

That happens to all of us. I think there is no one who does not use the wrong word at times. For example, I read an instruction, in which I used a word I did not intend. It was called to my attention. I had no [20] knowledge of it. But that frequently happens; not only happens in the course of ordinary conversation, but in court. I have had attorneys refer to plaintiff when they meant defendant, and vice versa; things just exactly the opposite. An page 90 there was a discussion between Mr. Marcus and Mr. Combs. I thought the matter was clear. Line 16:

‘THE COURT: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn’t it, Mr. Combs?’

‘MR. COMBS: Certainly, your Honor.

‘MR. MARCUS: If he did, your Honor, I don’t believe the question includes that statement.

‘MR. COMBS: We will just amend it to include it then.

‘MR. MARCUS: Thank you.’

There was a place where the court desired to make the point entirely clear. So, in reading over this, I can’t see that there is any reflection of an indication of bias. I know there was none. Nobody would know that better than myself; and I know there was none. Even considering the points which were brought out by Mr. Combs, considering all of those things, I can say I don’t think there was any indication of bias, and I don’t see how there could have been bias, because none existed.

I did not refer to all of the matters that I saw in the testimony of Miss Olvera which I thought might have some bearing on that point, but I don't think the court will [21] make any further statement in regard to the matter now, except that I am going to give very serious consideration to whether or not the instructions were justified by the law and the evidence, and when the court has done so it will make its ruling.

MR. COMBS: Would you like to keep that copy of the transcript for a while?

THE COURT: No, I don't believe it will serve any purpose. If I need it, Mr. Combs, I shall ask Mr. Dewing if he will read over certain parts of the testimony, or I may have it written up for me. I may say that I did have Mr. Dewing read for me that part which had to do with the interruption of counsel for the defendant, and certainly there was nothing in there that, in the court's opinion, would justify the conclusion that Mr. Combs has reached.

There occurs to me another thing which I would like to mention, and that is the reading of defendants' instruction No. 4, and then advising the jury to disregard it, and reading it again as the court corrected it. Immediately thereafter the court read a part of instruction 5, which was given by the court. The court was of the opinion that it was unnecessary to add that part, which was marked out. The court failed to give that part of the instruction, and it was so indicated, that it was given as modified, and gave instruction 4 as modified.

Now, as to stopping for five minutes or so, again I [22] dwell upon the imperfection of

judges, the same as the lawyers. When I went over the instructions I decided to give instruction 4 as it was offered. Then, in reading it, it had a different sound, had a different effect, and I felt that it was improper to give it as it had been presented, and I considered the propriety of changing it, and finally I did make the changes which appear upon the face of the instruction. It took some little time for the court to determine that, and also to make the changes, but that is not unusual in cases. It isn't the ordinary thing, it is true, because ordinarily among judges—and that applies to myself—generally judges who prepare the instructions give them just as they are prepared. And in a case it sometimes happens a judge may decide to change the instruction, even after he has given it; and that's what happened in this case, and I think it was not prejudicial, and there certainly was no intent on the part of the court except to make the instruction conform to what the court believed the law is.

I think the court has covered most of these matters. When this affidavit was filed by Mr. Combs I thought I might have some other judge sit upon this motion, but I came to the conclusion, and this after consulting a judge of our court, who has had long experience here, that when it came to the matter of a motion for a new trial that I was really the only judge who could and should act upon the motion. It [23] would be different upon the trial of a case in which a judge is charged with being prejudiced, at the beginning of the case. Then it would be entirely proper, and it is the law, if there is an affidavit of prejudice filed, that some other judge should sit upon it."

Misconduct of Appellee's Counsel

The opening brief again adopts the same course as above depicted concerning alleged misconduct of the Olvera's attorney. It states that "counsel made improper statements and comments to the jury" in connection with depositions and the whole case, which the trial court permitted, and refers this court to the transcript to find out, if it can, from pages 667-669 thereof of what language appellants' are complaining. The court is also referred to pages 32 and 33 of the opening brief for such information, where Point VIII of appellants' "Statement of Points" upon which they rely is said to make the revelation.

Said Point VIII, pages 32, 33, make no reference to the subject of counsel's comments and pages 667-669 of the printer's transcript relate a portion of only two comments of plaintiff's counsel.

Without the slightest attempt to show how counsel's comments were improper or prejudicial, or why, if improper or prejudicial, the withdrawal of one by said counsel when his error was corrected, and the instructions of the court to the jury to disregard both did not suffice to render such remarks harmless, respondent is not called upon to elucidate these matters or to anticipate an argument by appellants and combat a mere shadow which the appellants' indefinite and incomplete presentation of their assignment in this behalf have cast upon the record on which the instant judgment rests.

Respondent insists that appellants' opening brief abandons the issue and that they have no right to revive it or pursue it further.

The only argument in the brief proper on this point is stated as follows:

"Counsel made improper statements and comments to the jury in connection with depositions and in connection with the case as a whole which were permitted by the trial court during the course of the argument and *the instruction of the court to disregard certain of these matters* as appears in the record (Pr. Tr., pp. 667-669) did not alter the effect of bias and prejudice against defendants by reason thereof." (Page 83 of opening brief.)

The rule is apparently universally settled that an assignment of error will not be considered, but is regarded as waived, where it is not presented and argued in appellants' brief.⁵ Columns of cases are cited in 5 C. J. S. (pp. 1226-1230), in support of this proposition, and it is also said that where the point is not properly presented in the argument of the opening brief it will be disregarded even if discussed in the closing brief.

⁵*U. S. v. Chicago B. & O. R. Co.*, 82 F. (2d) 131; *Doherty v. Bartlett*, 81 F. (2d) 920; *Mo. Pac. R. Co.*, 78 F. (2d) 253; *Schwartzman v. Lloyd*, 82 F. (2d) 822; *Wynne v. Fries*, 50 F. (2d) 161.

Stark v. Haefl, 205 Cal. 102, 269 Pac. 1105; *Noble v. Noble*, 198 Cal. 129, 243 Pac. 429, 43 A. L. R. 1235; *Fairbanks v. MacReady*, 92 Cal. App. 156.

Silva v. Robinson, 156 So. 280 (Fla.); *Norman v. Atchison etc. Ry. Co.*, 101 Kan. 678, 168 Pac. 830.

Southeastern Ex. Co. v. Robertson, 264 U. S. 541, 68 L. Ed. 840; *Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 35 L. Ed. 1160; *Miles v. Caldwell*, 69 U. S. 35, 17 L. Ed. 755.

Under "Specification of Error Relied Upon" appellants under Point VII (Opening Brief, page 28) have listed certain isolated statements made to the jury during argument by plaintiffs' counsel as constituting "bias and prejudice" but no argument is presented in support thereof. (Opening Brief, page 83.)

The argument was perfectly proper and made in answer to defendants' argument to the jury. We quote portions of his argument to show the reasonableness of the answer.

" . . . And these gentlemen (defendants) in operating their business . . . could not possibly make a contract other than like the one they had here. . . .

The performer comes to the employer and says I want this job, and I am good at it. The employer says back: Will you take all the risks? We can't afford to take you unless you do. It would lick us in to time unless you did. She says: Yes, I will and she signs the contract." (Pr. Tr., p. 680.)

And again—

"Miss Olvera, when she undertook her contract with these show people, was very familiar with the whole business. She knew all the risks, dangers, and hazards; and *they would not have wanted a single performer for any of their shows, who did not have such a contract.*" (Pr. Tr., p. 679.)

And further—

" . . . Barnes Circus is *one of the big circuses of this country, enjoying an important part*

in the history of this country . . . not to be shamed and disgraced by suddenly being informed that they grossly and negligently conducted their business, which they had been conducting for 50 or 75 years. I claim it is not fair; it is not just; it is not right; it is not true." (Pr. Tr., p. 681.)

and

"Being a track man, I know that absolutely; if you keep your feet on the ground you can run faster than you can jump." (Pr. Tr., p. 685.)

and

"The fact of the matter is it was Miss Olvera's own unfortunate act, or her own carelessness that caused the misfortune; it was not the defendants'; and money should not be taken away from these defendants, and given to this plaintiff, just because she suffered an accident. That is not right; it is not the law; it is not justice, because the defendants are here entitled to the protection of the law and the court, just as the plaintiff is." (Pr. Tr., pp. 688, 689.)

and

"She was performing under this particular contract, and I have called the terms to your attention. I sincerely hope you will study it in the jury room. Its terms are clear and unambiguous. It is an independent contractors' case, and the relationship of master and servant does not exist." (Pr. Tr., p. 689.)

and

"Gentlemen of the jury, remember this is not a master and servant case. This woman was an independent contractor, and that, under the law,

implies that she had full control and direction of the means and manner of operating her act.” (Pr. Tr., p. 680.)

and

“This woman fell so close, not to exceed a foot, perhaps a little less, an ordinarily reasonably prudent man would have thought, especially if she were in a ball, turning over, that she would fall into the net.” (Pr. Tr., p. 687.)

and

“We have no hesitancy or doubt or concern in submitting this matter. When I say we, I mean I, as representing these two corporations, . . . ” (Pr. Tr., p. 692.)

Plaintiff's Instruction 14-A

The last assignment of misconduct by the court made indirectly in the opening brief by reference to other documents filed by them, concerns the above-named instruction.

It has been said that the thesis in the opening brief pertaining to bias and prejudice tapers off into nothingness.

It is believed that the simile which has been used in that behalf, is justified by the contrast between the averments in the above mentioned affidavit, sworn to by Mr. Combs, pertaining to said instruction 14-A and the *entire absence of even a reference to these averments*, in both the “Statement of Points” to which the opening brief refers and said brief itself.

That the aspersions against the trial judge contained in the said affidavit were untrue and unwarranted is *shown* by Judge Beaumont himself, and in effect admitted by the affiant when appellants' motion to set aside the verdict, for a new trial and other motions were heard. (Supp. Tr., p. 764 et seq.)

It is quite lengthy but the substance of what was said about the drafting of Plaintiffs' 14-A is as follows:

The Judge said that "when we were going over the instructions" Mr. Marcus was late; that after waiting some time he and defense counsel, Corkery and Combs, began to discuss them. Later Mr. Marcus came and the judge told him what the discussion had been. Among other instructions No. 14 was then taken up. Mr. Combs made an objection that it did not cover contributory negligence. The Judge thought it was sufficient. Mr. Marcus said, "if the court will reframe that instruction I will ask him to give it" and said he would withdraw "this other instruction." The court marked on No. 14 "may be withdrawn," and later marked it "refused."

The Judge denied that he had attempted to draw a formula instruction but declared:

"What I was trying to do, and I so stated, was to set the issues out clearly, and there were two or three bases on which, if they determined the evidence in that respect, they could not find for the plaintiff. So I set these up, and, I said

‘all of these terms will be defined’ I showed it to you. I think the three of you were standing here, right in front of the bench.”

The Judge asked if anyone had any objection. Mr. Corkery and Mr. Marcus made objections. The court did not give it.

Judge Beaumont said:

“During the time from, say about twenty minutes after ten, or so, until the time I mentioned when you left, we (Combs, Corkery and Marcus being present) spent all of that time discussing these instructions. One of those instructions was 14, and that when the court suggested that they ‘get some lunch’ the attorneys had other things to do, and Judge Beaumont said:

‘Very well, we have gone over these instructions. After all, they are the court’s instructions. I will go over them, and see what should be done.’ ”

The Judge made it clear that the one given, marked Plaintiffs’ Instruction 14-A, was entirely prepared by him.

In the end Mr. Combs said:

“MR. COMBS: I think your honor on the whole has very well recited the circumstances. I think I have a little different interpretation as to some of them but in substance it is not a great deal different. I will drop the subject.” (Supplement Tr., p. 768.)

No attempt was made to substantiate the sworn averments in Mr. Combs' affidavit that

"during the course of the trial, the court consulted privately in Chambers with David C. Marcus, attorney for plaintiff . . . and affiant is informed and believes . . . and alleges discussed at said private meeting instructions submitted by the parties to this action; and affiant was not called nor was any of the counsel for defendants' called in said consultations at which instructions were discussed; that thereafter the court of its own motion, prepared several instructions to be submitted on behalf of the plaintiff; that some of said instructions were abandoned but that the court in particular prepared and submitted and read to the jury plaintiffs' Instruction 14-A." (Pr. Tr., pp. 105, 106.)

Mr. Combs must have known that everything in the above quoted excerpt from his affidavit was untrue, false or unfounded, except that the trial Judge prepared "Plaintiff's Instruction 14-A" and so marked it.

Failure to present any evidence upon which he made the one averment on information and belief indicates that Mr. Combs had none. These insinuating aspersions at the trial Judge should not go unnoticed.

Again respondent insists that the affiant must have known that the averments of fact above quoted were untrue and that the averment on information and belief was unfounded.

This conclusion is compelled by his concession at the hearing on the motion for a new trial that the court's recital of the history of Instruction 14-A was substantially correct.

Appellants based their motion for a new trial entirely upon the foregoing averments and one other which reads as follows:

“That at the outset of this proceeding affiant submitted as a portion of Defendants’ Instructions, certain instructions on the subject of master and servant, copies of which are attached hereto marked Exhibit “A” and made a part hereof as if set forth verbatim herein, being six in number; that the Court examined the same and on or about the 5th day of January, 1944, the Court informed affiant that since the case was being tried on the theory of independent contractor said instructions were unnecessary, and requested that affiant withdraw the same, upon which said statement affiant did withdraw said [117] instructions; that thereafter and during the course of the trial, the Court consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said ground alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for defendants called in at said consultations at which instructions were discussed.” (Pr. Tr., p. 105.)

In said hearing on the motion for a new trial the gist of the statement above quoted was shown to be false, as shown by the following:

“THE COURT: When the question came up with regard to the instructions on master and servant, my recollection is that it came up the first time when the three counsel were present,—two for the defendants and one for the plaintiff, and that the observation was made that since the ruling in the case that went to the Appellate Court, the instructions regarding master and servant were not applicable, and I think then I said, ‘Is it your desire, Mr. Combs, to withdraw them?’ And you replied it was; but the court made no request that you do so. In twenty-three years on the bench, speaking of myself as a judge, I have never requested the withdrawal of an instruction in my court.

MR. COMBS: That is substantially what the affidavit says, in any event.

THE COURT: I don’t think it is, substantially. That is my recollection.

MR. COMBS: I don’t like to disagree with your Honor. My impression is a little bit different.

THE COURT: That is my recollection.

MR. COMBS: I know we had a discussion on the 5th, in court. I put that date down. I know we also had one on the 8th.

THE COURT: I couldn’t say about the dates.

MR. COMBS: Anyway, reasonably sound minds can be mistaken on those things.

THE COURT: That is true. Another thing that happened later on, when you said that you would withdraw them, you did not withdraw all of them. I looked through, and saw at least one—there may have been two—and I said, ‘Mr. Combs, you didn’t withdraw all of your instructions,’ and you said, ‘No, I notice that I did not, but I think I will leave them in there. My theory is that the master and servant rule does not apply, but I have other counsel, and I think I should let them stay in.’ I said, ‘Very well, let them stay in.’ I refused to give them.” (Pr. Tr. Supplemental 764-765.)

Certain it is that the court was right. The affidavit plainly declares that the court “requested affiant to withdraw said instructions” on master and servant.

This is certainly not “substantially” the same as the court asking,

“Is it your desire, Mr. Combs, to withdraw them?
 . . . The court made no request that you do so.”

Why should any trial Judge *request* an attorney to withdraw any instruction?

At any rate Mr. Combs in effect confessed that the court did not make such alleged request.

It is pertinent, (since the course of conduct of defense counsel concerning the entire matter of the motion for a new trial suggests lack of good faith).

It should be added that the affidavit of David C. Marcus controverts each of the averments in the Combs' affidavit, except that the court prepared Instruction 14-A, but after conference with both sides.

If ever a motion for a new trial was groundless and sham it surely is the instant one.

However, in defendants' "Statement of Points" upon which they rely, they still specify these grounds.

Even the opening brief (p. 33) nominally clings to the same ground for reversal of the judgment, based, it must be remembered, on the Combs' affidavit and nothing else.

It is true that this ground is not named in the matters to be argued. (Op. Br., p. 43), but its retention in the brief for any purpose, perhaps merely for the moral affect is unwarranted since it was shown, and virtually admitted that it was unfounded.

The Alleged Errors

Under "Point VII" and the caption charging bias and prejudice against the court, the opening brief next descends to three mere assignments that the court "erred," and concludes by a weak and pitiful complaint of the "plaintiff herself" because she "traveled without a cast," and "greatly accentuated and made permanent an otherwise curable injury."

Truly, this is like the final taper into nothingness of the mouse's tail.

The errors of which complaint is made are not discussed or attempted to be shown to be either erroneous, material or prejudicial, and the concluding complaint against the plaintiff herself quite obviously concerns a matter for discussion with the jury, but not appropriate for presentation to an appellate court at all, much less under an assignment of bias and prejudice of the trial court.

Ample authority has been cited which hold that under such circumstance the alleged errors are waived.

Attention is also called to the general rule that a point raised for the first time in a reply or a supplemental brief,⁶ will not be considered and the appellate court will not examine the record in a search for prejudicial errors which are not "clearly pointed out" in the brief of the complaining party.

With reference to instructions assigned as erroneous the complaining party must call attention to reasons why they are erroneous and show wherein he was prejudiced.⁷

On the amount of the verdict we shall not give extended argument. Appellants' brief on this point simply suggests "numerous errors and comments by both court and counsel during the trial and the argument contributed in this case (along with several rulings on evidence) to an excessive verdict." (Op. Br., p. 86.)

⁶See 5 C. J. S., p. 1230, and 5 C. J. S., p. 1914, and decisions cited, including *Nash v. Rehman Bros.*, 53 F. (2d) 624.

⁷*Truman v. Sutter-Butte C. Co.*, 76 Cal. App. 293; *In re McDonald's Estate*, 191 Cal. 161.

Nothing further is stated, no reasons, citations or references are given. In reply we suggest, that this matter was passed upon by the trial court on defendants' motion for new trial, and the injuries and damages suffered by appellant do support the amount of the verdict. When it is remembered that plaintiff earned in excess of \$100 a week average including her summer performances over the world; that her meals and transportation were furnished by defendants; that the accident happened in 1937; that she has not worked a day since the accident or earned any money; the seriousness of her injury and her great pain and suffering all these years; that she will never be able to perform again; that she is unable to walk or be about without the aid of crutches; that her injuries are permanent, certainly the verdict is not excessive.

CONCLUSION

In conclusion respondent submits that the decision of this Court as set forth in its opinion on the former appeal is decisive of each of the major issues presented by Appellants' Opening Brief, and that the other points have been waived by reason of insufficiency of proper presentation.

It is said in *American Jurisprudence*, Volume 5, page 332:

“As a general rule, the appellants' brief must be so prepared that all questions presented by the assignments of error can be determined by an

examination of the briefs, without looking to the record, and questions not so presented . . . are usually considered waived.”

Surely this Court cannot determine, without searching and analyzing the record, any of the questions presented in Appellants’ Points VII or those whose lack of proper presentation in the other points in the opening brief have been pointed out.

We regret having been compelled to reveal many errors in factual statements in that brief, and also, that this reply could not have been shorter.

On many of the issues reliance upon the doctrine of law of the case would suffice, but it has seemed that other considerations which refute or bar appellants’ several contentions should also be pointed out.

It is submitted that the judgment of the District Court should be affirmed.

DAVID C. MARCUS,
Attorney for Appellee.

Appendix

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APPENDIX

Appeal from the District Court of the United States for the Southern District of California, Central Division; Campbell E. Beaumont, Judge.

Personal injury action by America Olvera, also known as America Olvera Pollinger, against Ringling Bros.-Barnum & Bailey Combined Shows, Incorporated; and Al G. Barnes Amusement Company, sued as Al G. Barnes, Incorporated. The cause was removed from the state court. From an adverse judgment, Ringling Bros.-Barnum & Bailey Combined Shows, Incorporated, and Al G. Barnes Amusement Company, sued as Al G. Barnes, Incorporated, appeal. The appeals were consolidated.

Reversed.

Combs & Murphine, of Los Angeles, Cal., for appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

Arthur Garrett, of Los Angeles, Cal., for Appellant Al G. Barnes Amusement Co.

David Marcus, of Los Angeles, Cal., for appellee.

Before DENMAN, MATHEWS, and HEALY, Circuit Judges.

DENMAN, Circuit Judge.

These are consolidated appeals from a judgment upon a verdict awarding damages to America Olvera, hereafter called Olvera, for injuries to her while performing as a trapeze artist, against each of two circus corporations. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., hereafter called Ringling and Al. G. Barnes Amusement Company, hereafter called Barnes.

Olvera, in Florida, entered into a contract with Ringling by which she agreed, as an independent contractor, to give her performances as a trapeze artist in Ringling's and other circuses. Among other agreements it provides that Ringling "by agreement reserves the right to transfer and place the artist during the term or part term of this contract, with any other of *its* shows or circuses—under its ownership or *management* all the terms and conditions of this contract continuing, prevailing and obtaining."

Appellants admit that the stock control of both circuses was in a common trust, though each has an independent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes' circus was one of "its", Ringling's, circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances; and that they were caused by either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling's management.

Olvera further agreed:

"8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the 'act' by reason of the Artist's skill constitutes a 'feature' performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

"The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same."

There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing and "maintaining" parts of its "equipment" and "apparatus," namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in failing to hold it under her, causing the injuries and the damages to her for which the jury gave its verdict.

Were these all of the contract provisions involved, the judgment would have to be sustained.

Appellants complain of the lower court's refusal to give the following instruction concerning a clause of the contract providing that Olvera agreed that she "accepts all risks incident to the business":

"Instruction No. 14. In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue."

The instruction was properly refused. Olvera might recover though she knew the danger and peril of the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries. The requested instruction is fatally defective because not containing some such words after the words "she cannot recover" as "if her injuries were caused by such danger and peril."

Appellants contend that the construction of the contract terms, both as to initial validity and as to performance, is governed by the law of Florida, and that the Florida law requires a construction of a provision of the contract, hereafter considered, to the effect that appellants are not liable for ordinary negligence but only for "gross, willful or criminal negligence." It is hence urged that the court erred in refusing to give the following instruction:

"Instruction No. 1-A. You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

"Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences."

The injuries to Olvera occurred in a performance while the circus was traveling through Kansas. At the pretrial conference it was stipulated that Florida was the place of making of the contract and the stipulation made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial (Federal Rules of Civil Procedure, rule 16, 28 U.S.C.A. following section 723c). At the trial there was evidence from which it could be inferred that the contract was executed in Texas, but the order was not modified and we hold the stipulation is binding.¹

This suit was commenced in the Superior Court of the State of California and from there removed to the United States District Court for the Southern District of California. The contract does not indicate any state in which it is to be performed and the rule that, in such a case, the law of the place of making controls its interpretation is well stated by the Civil Code of California, here the law of the forum: "§ 1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

The contract itself provides that the law of Florida shall control its interpretation: "10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, constructions, interpretation and enforcement of this contract, be determined."

Here is a contract to perform in one or more circuses traveling from state to state. It was competent for the parties, even if the law of the forum was different, to agree upon and fix the law controlling all the liabilities and obligations of the parties with regard to performance as that of the state of the contract's execution, and not have it constantly shifting as the circus wandered from one jurisdiction to another.²

¹See footnote infra showing the identity of the law of Texas and Kansas with that of Florida on the interpretation of the pertinent contract provisions.

²*Boseman v. Insurance Co.*, 301 U.S. 196, 202, 203, 206, 57 S.Ct. 686; 81 L.Ed. 1036, 110 A.L.R. 732; *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-409, 47 S.Ct. 626, 71 L.Ed. 1123; *Pritchard v. Norton*, 106 U.S. 124, 136, 1 S.Ct. 102, 27 L.Ed. 104; *Clark v. Gibbs*, 5 Cir., 69 F.2d 364, 365; *Bertonneau v. Southern Pac. Co.*, 17 Cal. App. 439, 443, 120 P. 53; *Palmer v. Atchison, etc., R. R. Co.*, 101 Cal. 187, 195, 35 P. 630; Cf. *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 A. 158, 163, 164, 112 A.L.R. 113, 121, 122.

The provision of the contract which, under the Florida law, appellants claim exempts them from their ordinary negligence, is: "12. Now, therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants and any transporting railroad company handling the Show's circus train movements, of and from claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during the period of performance under this contract and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

It will be noted that negligence is not mentioned as an excepted liability. Appellees claim the provision is so broad that it cannot be deemed to exempt the appellants from any sort of liability. There is not cited, nor are we able to find, any Florida case construing such a provision. However, the common law prevails in Florida.³ The United States Supreme Court, in determining the common law with regard to such agreements, before *Erie Railway v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, has held that, though negligence is not mentioned in the exempting clauses, such broad provisions going to the essence of liability as "all risk of loss or damage", "at consignee's risk of loss and damage", "all risk of accident to person and baggage", and "no obligation or risk in case of accident or damage to men and supplies" relieve from liability for ordinary negligence a railroad company contracting in its private and not public service capacity. *Santa Fe Ry. v. Grant Bros.*

³*Cummer Lumber Co. v. Silas*, 98 Fla. 1158, 125 So. 372, 374; *Co-operative Sanitary Baking Co. v. Shields*, 71 Fla. 110, 70 So. 934; *Ingram-Dekle Lumber Co. v. Geiger*, 71 Fla. 390, 71 So. 552, 554, Ann.Cas.1918A, 971.

Const. Co., 228 U.S. 177, 188-194, 33 S.Ct. 474, 478, 57 L.Ed. 787.⁴

In Florida prevails an almost complete survival of the common law freedom of contract.⁵ It is clearly inferable from the language of the Florida supreme court in *Atlantic Coast Line Ry. v. Beazley*, 54 Fla. 311, 45 So. 761, 770, 787, that Florida has no public policy against contracts exempting railways from liability for negligence even to their railway employees,⁶ apart from a specific statute, that court stating: "All parties litigant who are sui juris, whether railroad corporations or their employes, in the eyes of the law, before the courts stand upon an equal footing, entitled to equal rights and protection, and none to special privileges. In no sense of the word can railroad employes be said to be wards of the court, nor would they wish to be so regarded. . . . It may well be that plaintiff made a rather hard bargain with defendant; but with that we have nothing to do, so long as no fraud or deception was practiced and the contract was legal in all respects. *Scotch Manufacturing Co. v. Carr* [53 Fla. 480] 43 So. 427."

⁴Accord: *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U.S. 84, 35 S.Ct. 491, 59 L.Ed. 849; *New York Cent. Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L.Ed. 627; *Long v. Lehigh Valley R. Co.*, 2 Cir., 130 F. 870; *McCormick v. Shippy*, 2 Cir., 124 F. 48; *Chicago, etc., R. Co. v. Wallace*, 7 Cir., 66 F. 506, 30 L.R.A. 161; *World's Columbian Exposition Co. v. Republic of France*, 7 Cir., 96 F. 687, 694, 695; *Bates v. Railroad Co.*, 147 Mass. 255, 17 N.E. 633; *Hosmer v. Railroad Co.*, 156 Mass. 506, 31 N. E. 652; *Barrett v. Conragan*, 302 Mass. 33, 18 N.E.2d 369; *Clarke v. Ames*, 267 Mass. 44, 165 N.E. 696; *Northwestern Mut. Fire Ass'n v. Pacific Wharf & S. Co.*, 187 Cal. 38, 200 P. 934; *Weirick v. Hamm Realty Co.*, 179 Minn. 25, 228 N.W. 175, 176; *Holly v. Southern Ry. Co.*, 119 Ga. 767, 47 S.E. 188, 189; *Cato v. Southern Ry. Co.*, 26 Ga. App. 578, 107 S.E. 98, 99; *Niederhaus v. Jackson*, 79 Ind.App. 551, 137 N.E. 623, 624; *Missouri Pac. R. Co. v. Fuqua*, 150 Ark. 145, 233 S.W. 926; *Fidelity Union Life Ins. Co. v. Fine*, Tex.Civ. App., 120 S.W.2d 138; see also *Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244, 75 P. 71, 64 L.R.A. 81, 1 Ann.Cas. 883.

⁵*Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 So. 427, 428; *Hall v. O'Neil Turpentine Co.*, 56 Fla. 324, 47 So. 609, 612, 613, 16 Ann.Cas. 738; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922, 930; *Mizell Live Stock Co. v. J. J. McCaskill Co.*, 59 Fla. 322, 51 So. 547, 550; *Prudential Ins. Co. of America v. Prescott*, 130 Fla. 11, 176 So. 875, 880, 881; *Pierce v. Isaac*, 134 Fla. 666, 184 So. 509, 513; *Travers v. Stevens*, 108 Fla. 11, 145 So. 851, 854, 855; *Mitchell v. Mason*, 65 Fla. 208, 61 So. 579, 589, 590; *Davis v. Strine*, 141 Fla. 23, 191 So. 451, 452; *City of Leesburg v. Ware*, 113 Fla. 760, 153 So. 87, 89, 90; *Florida Nicolson v. Good Samaritan Hospital, Fla.*, 199 So. 344, 349. Cf. *Ireland v. Craggs*, 5 Cir., 56 F.2d 785, 787.

⁶In Texas there is no public policy against contracts between ordinary and independent contractors, like *Olvera*, which exempt from liability for ordinary negligence. *Missouri, K. & T. Ry. v. Carter*, 95 Tex. 461, 68 S.W. 159, 164-166; *Fidelity Union Life Ins. Co. v. Fine*, Tex.Civ.App., 120 S.W.2d 138, 139.

Similarly in Kansas, independent contractors may exempt themselves from

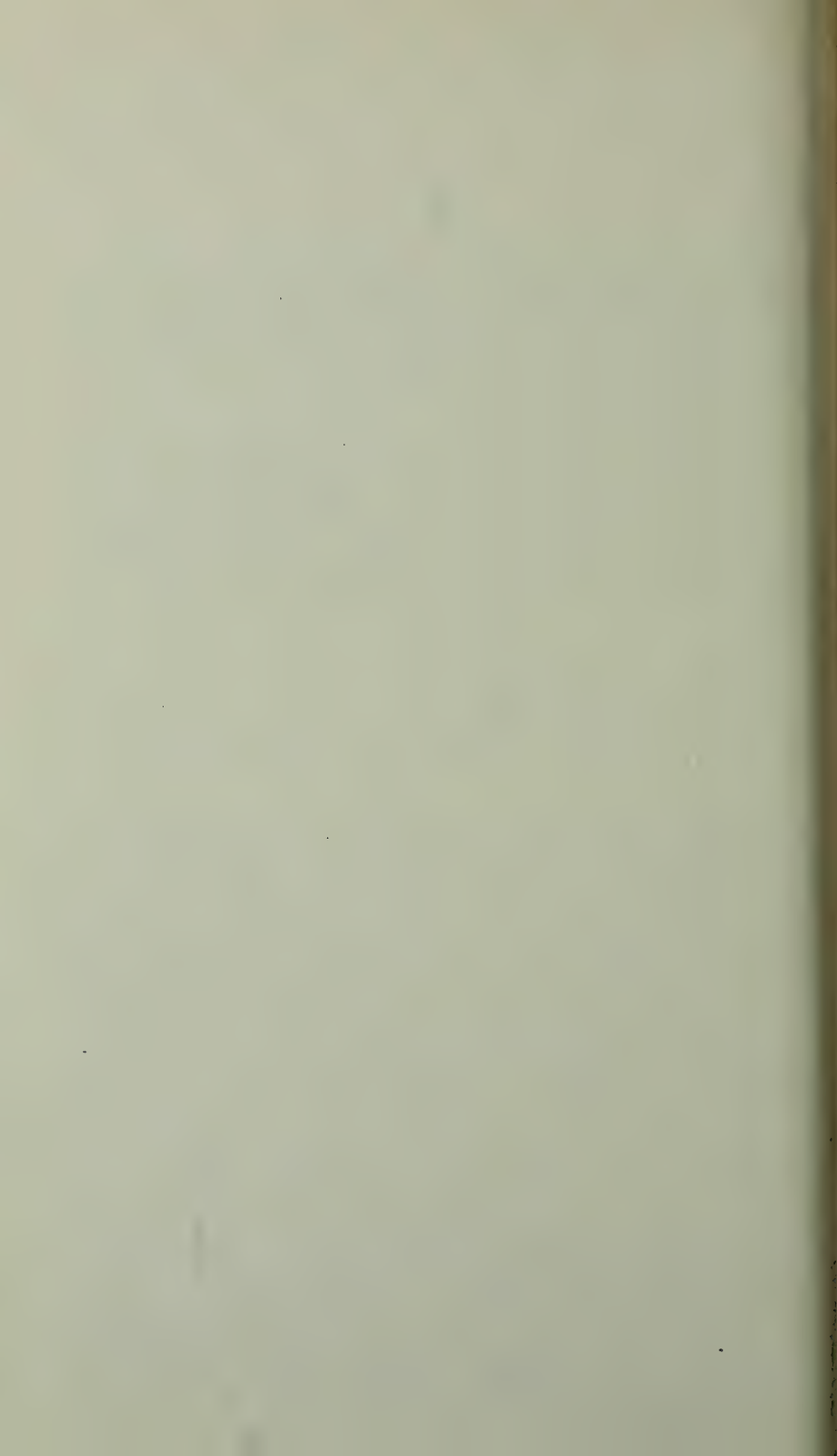
We hold that the last cited provision of the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence and the court erred in refusing the requested instruction concerning their liability solely for gross negligence.

The judgment is reversed.

MATHEWS, Circuit Judge (concurring in the result).

There was no evidence warranting a finding that the injuries sustained by appellee Olvera were proximately caused by the negligence—gross, or ordinary—of appellants or either of them. Appellants' motion for a directed verdict should have been granted.

liability for ordinary negligence. *Thirlwell v. Hines*, 108 Kan. 700, 196 P. 1068, 1069; *Griffiths Grain Co., v. St. Joseph & G. I. Ry. Co.*, 94 Kan. 590, 146 P. 1134; *Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co.*, 68 Kan. 244, 76 P. 71, 64 L.R.A. 81, 1 Ann.Cas. 883; See also *Atchison, T. & S. F. Ry Co. v. Fronk*, 74 Kan. 519, 87 P. 698, 699, 700, 11 Ann.Cas. 174, and *Sewell v. Atchison, T. & S. F. Ry.*, 78 Kan. 1, 96 P. 1007, where the Kansas supreme court distinguishes between contracts attempting to exempt railways from liability to their employees for negligence and such valid provisions in agreements between independent contractors.



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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RINGLING BROS., BARNUM & BAILEY COMBINED SHOWS.
INC., a corporation, and AL G. BARNES AMUSEMENT
COMPANY, a corporation,

Appellants,

vs.

AMERICA OLVERA, also known as America Olvera Pollin-
ger,

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

MAY 1946



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APPELLANT'S CLOSING BRIEF.

The Appellee's reply brief opens on the first four pages thereof with a group of assumptions as to what the meaning of the court's former decision on this matter was. This was done in relation to his argument on the law of the case and assumes as its premise the fact that the evidence in the second trial was identical with that of the first. A careful study of these items themselves will disclose the fallacy of the same, and that few, if any of them, really comprise the judgment of the court in the former appeal. Some of these defects arise from co-mission, others from omission, notably No. 9, which recites only one definition of *what* gross negligence is. There are many other definitions. Departing then, for the moment from his argument, counsel presents what

he calls a statement of the case. We respectfully submit that appellee's statement is not borne out by the evidence, includes many exaggerations and untrue interpretations of the evidence, and differs in many material respects from that presented in appellant's opening brief. These differences appear from the record of the two briefs, and it will avail nothing to reiterate them now. Thereupon appellee presents what she chooses to call her reply to appellants' arguments in their opening brief, dealing with the same, more or less, in the order presented in appellants' opening brief. For that reason we will return to the titles adopted in appellants' opening brief in this our reply.

POINT I.

There Is No Evidence of Gross Negligence or Wilful Misconducts Sufficient to Support the Verdict in This Case.

In attempting to answer this point, counsel first seeks application of the law of Florida as to what constitutes gross, or any, negligence. We believe that the *locus delicti* prevails as to that particular point and accordingly in our brief have often cited Kansas law. In the first appeal in this case as we read it, the Court, on the subject of what law governed, decided only that the Florida law governed by contract, as to all matters concerning the application of or interpretation of the contract itself. We believe it to be silent on what would constitute negligence or gross negligence, as that point was not necessary to be decided, and was not decided and we believe the law of *locus delicti*

applies as to that. Quoting from 15 C. J. S., Sec. 12, page 897:

“It is thoroughly established as a general rule that the *lex loci delicti*, or the law of the place where the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases of torts or the actions therefor, * * *”

15 C. J. S., Sec. 12, p. 897.

Thereupon in answer to this point, appellee attempts to set up the doctrine of the law of the case, claiming as her conclusion that the evidence was identical, or nearly so, in both trials. This is not at all the fact. A totally different, and entirely independent examination and cross-examination was made of plaintiff's key witnesses, being plaintiff herself and her husband, Mr. Pollinger. Several other witnesses were examined and testified in a different manner, and several new witnesses were produced during the course of the trial (Joe America Yacopi). Not only that, but the comparison of the testimony of America Olvera in the second trial will indicate what counsel writing this brief, industriously attempted and succeeded in doing. That is, we took the meaning of the Court's language in the opinion in the former trial when it said, “There was evidence from which the jury could *infer* . . . that there was either gross or ordinary negligence in setting up and maintaining the trapeze . . . and on the part of the net holders in failing to hold it under her . . .” We resolved that in the retrial of this case, there would be no loophole through which such inferences could be sustained. The success of our effort in that regard is apparent—clearly so—when we consider the testimony on the two points of negligence charged in this case.

1. **The Erection of the Apparatus and the Utter Impossibility of the Trapeze Swinging Normally, If True That One of the Figure Eight Hooks at the Top of the Trapeze Was Overlapped From Four to Six Inches, or Overlapped at All.** [Pr. Tr. p. 224; p. 226.]

This claim is irretrievably lost to plaintiff by reason of the fact that the trapeze swung evenly though not controlled in any way by her, notwithstanding the fact that the trapeze swung on two radii, one of which was from four to six inches longer than the other. [Pr. Tr. p. 226.] In establishing her answer in cross-examination to the reason why the lower bar was level when she undertook her act, she testified that when she looked up she saw the eight-hook tangled up and that the compensating factor was some other kind of a tangle-up on the same side of the trapeze as the eight-hook. This obvious fallacy would not have compensated for the difference in the length of the line and thus adjusted the level of the lower bar, but, on the contrary, would have exaggerated it and made it worse or more unlevel, unless such a compensating factor had really been on the other side of the trapeze. Her reason for selecting this adjustment obviously was that she knew that in the split second she claims to have looked (in order to sustain her claim of negligence)—she could not possibly have looked also over at the other side and found a maladjustment there. Bear in mind that she does not claim not to know what really caused the downfall of the trapeze, but does claim to know specifically what it was. Therefore, she does not have available to her any inference from that situation, having specifically stated just what it was. It is claimed that this contention is borne out by the fact that the trapeze hung lower on the one side than on the other just after the accident, while the reason for it so hanging undoubtedly was that

the employees of the circus had already started to lower the trapeze and that one side went down faster than the other. Nevertheless, if it is true, as claimed by appellee, that such was not the case, it serves conclusively to confirm the physical fact that the trapeze could not have been level when she mounted it in the first place. It goes without saying that if she mounted the trapeze in an unlevel condition at the outset, she has no claim for damages in this case. Examination of the evidence on the foregoing matters indicates that it was much more elaborate and clear in the second trial than in the first. [Pr. Tr. pp. 189-231.] This evidence forestalled any possible inference as to the foregoing of appellee's two claims that she had a right to recover.

2. Even More Clearly and Conclusively the Cross-Examination Respecting the Location and Handling of the Net Deprived the Jury of Any Possible Inferences Concerning Its Management and Handling.

In the first trial, little, if any, examination was made of the plaintiff or other witnesses on this subject. But in the second trial, it was elaborately gone into for the reason that again counsel preparing this brief, mindful of the statement of the Appellate Court in the first trial, urgently sought to establish no possibility of any inference regarding the facts concerning its operation. For that reason we established that the net was held in identically the same place and in the same manner as it had been held for six months before and exactly where directed by appellee. The only possible negligence plaintiff could, therefore, claim would be that the men in failing to move with the net and catch her with safety were grossly negligent. There can be no inference whatsoever regarding any other negligence on their part, in as

much as they did as she told them and approved. To say that there is evidence in this second trial from which it could be inferred that there was negligence, either gross or ordinary, in relation to either of the two items referred to, would be to state that the mere fact of the fall itself—the ultimate fact in this case—was one from which gross negligence could be inferred. Having in mind the ruling stated in cases in appellants' opening brief, that two seconds is too short a time upon which to predicate negligence, how can the court then do other than reverse this judgment in favor of appellants where it is evident that approximately 1.2 seconds were afforded the holders of the net to appraise the situation and catch America Olvera? Counsel indulges in his brief in two arguments of fantasy, not unlike those used before the jury when he said: "This company which had waxed rich and powerful and mighty upon the performance of ability of people like Miss America Olvera." [Pr. Tr. p. 666.] And again, he says, "We are a mighty corporation. We are the greatest circus in the world * * * Those are his words." [Pr. Tr. p. 694.] The arguments referred to are that the recital of the falling body rule is untrue, because a feather would then fall just as fast as a human body; and second, that the jury may not speculate on how long the arc on a swing of two different radii is. The jury and the court take judicial knowledge of laws of nature or physical facts, and these are physical facts. (Code of Civil Procedure, Sec. 1875, Subd. 8; *Varcoe v. Lee*, 181 Pac. 223, 180 Cal. 228.) A large number of cases is cited in Chapter One, Par. 2 of California Evidence Manual by McBain. The rule set forth in this text may be quoted as follows:

"That the matter be one of common and general knowledge, that it be well established, and authorita-

tively settled, be practicably indisputable, and that this common, general and certain knowledge exists in the particular jurisdiction.”

The falling body rule is correctly stated as follows:

“Acceleration as used in mechanics is a term denoting the rate of change in the velocity of the moving body. It is what the increment in velocity in a unit of time would be if the rate of change were uniform for that unit. When a body falls in a vacuum near the earth’s surface, the increment in velocity is about 32.16 feet per second, and this is known as the acceleration of gravity.”

Encyclopedia Britannica, Vol. I, p. 91-C.

It is, of course, true that the fall is determined by the pull of gravity which reaches its extreme at about the time when an object has fallen for one second. Likewise, this rule is fixed as at about the earth’s surface, as above stated, and in a vacuum—mass, that is to say, the weight or density of a given object, does not in any way increase or retard this gravitation pull in a vacuum. A feather would fall just as fast as a steel marble in a vacuum at or near the earth’s surface. A feather would not fall that fast outside a vacuum for the simple reason that a feather is a very large object of relatively small weight and the resistance afforded by the air in making its fall retards it greatly; whereas, a human body is a relatively compact and heavy mass and its rate of fall is retarded but very little by the air. Reduced to our own case, the fact of the matter is that the human body would fall but infinitesimally slower than a steel or lead marble, whereas, a feather with literally thousands of times as much space

per gram of weight exposed to the resisting air would fall much slower. It is extremely conservative to say that in a second the human body would fall at least 32 feet per second, even in the air, with the air's resistance against it. The rule regarding the radii of arcs can be amply illustrated by experimentation. If one hangs a bar on two lines, one of which is only slightly longer than the other, and swings the bar normally from the center, it will be obvious in a moment that the side with the longer radius will swing out farther at each end than the one with the shorter.

From the foregoing discussion it will be seen that the doctrine of the law of the case does not and cannot apply to this appeal. The facts in the first trial were vastly different from those brought out in the second trial, and while in the first trial there may have been the possibility of some inferences remaining open, in the second trial all possible inferences were removed, and it was made clear and definite from appellee's own testimony, that the way in which the accident happened repelled any inference of gross negligence.

On the doctrine of law of the case, we cite the California decision of *Madsen v. LeClair*, 13 P. (2d) 939, wherein the court held that when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the Appellate Court, that similar evidence

at a former trial of the cause was insufficient to justify a similar decision . . . and, if in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not a finding of that fact.

In *Allen v. Bryant*, 100 Pac. 704, 155 Cal. 256, the court said *that the doctrine of law of the case is rarely, and in a very limited class of cases, applied to matters of evidence as distinguished from rulings of law.*

It is an interesting thing that in answer to our point, the facts to which we devote approximately eighteen pages of our brief, the answer appears on page 35 of counsel's brief in four lines. An interesting comparison to this is the fact that the answer to our last point in our brief, notably the prejudicial remarks by the court, to which we have devoted a little better than two pages (occupies) approximately 40 pages of the reply brief. We, of course, recognize that our point of bias and prejudice alone cannot avail us a reversal in this case. It is brought out because it existed in our judgment and should be brought out because it relates to other matters contained in our brief. It is apparent, however, from the attention we devoted to it that it is not our main point on appeal. Acceptance of it as the main point on appeal by appellee must indicate along with his slipping by the first opening point in our brief with only four lines of comment that he is trying to drag a herring across the trail of the real issue in this case.

POINT II.

The Court Erred in Giving Instruction 14-A.

We doubt that we could amplify much more than has already been said in our opening brief. On this point, suffice it to say that this was a formula instruction. The law is that formula instructions must contain all defenses. An examination of the record in this case will disclose that the first portion of this instruction did not. An examination of the second section of this instruction, commencing with the words "or if you find by such preponderance of the evidence . . .", conclusively establishes the error in giving it. The court in giving this instruction used the following language: "And that said defendants employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell." Now, had the court left out the words, "that they failed to catch plaintiff when she fell"—this half of the instruction would have violated only the elimination of the affirmative defenses in so far as the net was concerned, but as it stands it actually defines what the jury should find to be a grossly negligent manner; that is to say, a "manner that they failed to catch plaintiff". In other words, the grossly negligent manner, the court said, would certainly be to fail to catch plaintiff. That reopened the whole case on ordinary negligence, instructed the jury that they must find for the plaintiff even if no negligence occurred at all, but if defendants merely failed to catch America Olvera. We submit that such an instruction is conclusively and absolutely erroneous and cannot be repaired or corrected by any other instruction.

POINT III.

Independent Contractor.

We have dealt with this point adequately in our opening brief and will not add anything to the matter therein contained.

POINT IV.

Assumption of Risk.

We make the same comment as under Point III.

POINTS V and VI.

We make the same comment as under Point III.

POINT VII.

We have submitted the facts and circumstances upon which we based our claim of bias and prejudice. They are adequately and thoroughly set forth and we have already stated what reliance we have upon them.

To comment briefly on this subject of bias, may we suggest that it is a very remarkable thing indeed, that a trial court would order up on the appeal the entire statement that he made at the time of rulings on the motion for new trial. This was done on motion for appellee. It certainly is not a material consideration or matter for the Appellate Court. It merely serves to confuse and clutter up the Appellate Court record. Not only that, but the Court made a change in the record. Not only that, but the Court made a change in the record at the time of the motion to supplement the record on appeal, changing the answer of America Olvera concerning her citizenship. The Court did that on the mere statement of opposing counsel in contradiction to the statement made by our-

selves, and after the reporter had examined the record and stated that his notes were clear.

“The Court: It is quite possible that the reporter may have misunderstood * * *

Mr. Dewing is a good reporter but he is subject to mistakes as well as anybody and he is very willing to admit it if he does make a mistake. *He has looked at his record and his notes seem to be clear.*” [Supp. Tr. of Record, p. 790.]

Now in the teeth of that and of the following remarks by the Court:

“The Court: I have no independent recollection and I don’t purport to base my rulings on any recollection whatsoever” [Supp. Tr. of Record, p. 800],

the Court did make an order changing that answer.

May we suggest that that supplemental record in itself is some indication of the very bias of which we complain in our Opening Brief.

Further comment upon bias and prejudice will only serve unduly to prolong this brief. We suggest to the court, however, that we do not intend to be led off from the real main, vital and important issues in this appeal by a voluminous answer to the many sharp things that are said in appellee’s brief concerning ourselves.

Respectfully submitted,

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